SUBMITTED Apr 9-

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1927

No. 403

JERRY R. McCOY, PETITIONER,

vs.

A. S. J. SHAW, AS STATE AUDITOR OF THE STATE OF OKLAHOMA, AND THE PURE OIL COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

Remedy at Law

PETITION FOR CERTIORARI FILED JULY 28, 1927

CERTIORARI GRANTED OCTOBER 31, 1927

(32,855)

( )

SUPREME COURT OF THE UNITED STATES

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IN SUPREME COURT OF OKLAHOMA

Case-made from District Court of Oklahoma County—Filed May 13, 1926

[File endorsement omitted.]

In District Court of Oklahoma County, State of Oklahoma

No. 48423

Jerry R. McCoy, Plaintiff,

vs.

C. C. Childers, as State Auditor of the State of Oklahoma, and The Pure Oil Company, a Corporation, Defendants

Petition—Filed October 20, 1925

Comes now the plaintiff and for cause of action against the defendants, states and alleges:

I

That the said defendant, C. C. Childers, is the duly elected, qualified and acting State Auditor of the State of Oklahoma and The Pure Oil Company is a corporation organized, chartered and existing under and by virtue of the laws of the State of Ohio, but duly authorized to transact and is transacting business in the State of Oklahoma.

[fol. 7] II

That said plaintiff, Jerry R. McCoy, is a member of the Chickasaw Tribe of Indians in the State of Oklahoma, formerly Indian Territory, and duly enrolled as a member of said Tribe or Nation of Indians as having one-fourth degree of Indian blood. That under and by virtue of the treaties and agreements and the supplements thereto, made

and entered into by and between the United States and the Chickasaw Nation or Tribe of Indians, as well as the Acts of Congress relating thereto, the said lands of the said Chickasaw Nation or Tribe of Indians were allotted and divided in severalty among the members of said Tribe so as to give to each member of said Tribe a separate portion and parcel of the said land. The said lands so allotted and conveyed to the several members thereof to vest in said member, to whom the same was so allotted, in severalty and to exclude the said Tribe or Nation and all of the other members of the said Tribe from any interest in such land so allotted in severalty to such member thereof. That under said agreements and Acts of Congress the said Jerry McCoy as such member of said Tribe received and there was allotted to him as his share and distributive portion of the said lands of said Tribe or Nation of Indians the following described real estate situated in Carter County, State of Oklahoma, to-wit:

South Half of the Southwest Quarter of Section Fourteen (14); East Half of Northeast Quarter of Northeast Quarter of Section Twenty-two (22) and the North Half of the North Half of the Northwest Quarter of Section Twenty-three (23), Township Four (4) South, Range Three (3) West; as surplus, and East Half of Northwest [fol. 8] Quarter and North Half of Southwest Quarter of Section Fourteen (14), Township Four (4) South, Range Three (3) West, as homestead,

and by reason of said Acts and agreements mentioned above, the said Jerry R. McCoy became and is the sole and exclusive owner thereof and a patent, duly conveying the said land to said Jerry R. McCoy, designated as surplus above, has been duly issued and delivered to him, being executed by the last executive of said Tribe on the 23rd day of March, 1907, and also a patent duly conveying to the said Jerry R. McCoy the portion of said lands designated above as homestead, has been duly issued and delivered to him, being executed by the last executive of said Tribe on the 21st day of March, 1907, all of which was done pursuant to and in conformity with the said agreements and Acts of Congress aforesaid and both of which said patents were duly approved by the Secretary of the Interior.

III

That as provided in the said agreements and Acts of Congress mentioned above, all of the said lands are non-taxable and shall remain non-taxable so long as the title remains in the said Jerry R. McCoy, not to exceed, however, twenty-one years from the said respective dates of said patents. That said title to said lands still remains in said Jerry R. McCoy and has never passed out of him and he is now the sole and exclusive owner thereof.

IV

That oil has been found and produced under and from the said lands of the said plaintiff described above, com-[fol. 9] mencing several years prior to the institution of this action and is still being so found and produced under and from said premises.

V

That the State of Oklahoma has enacted certain laws providing for the payment of certain taxes on the said oil so produced from all lands in the State of Oklahoma, commonly known as a gross production tax; and the said laws of the State of Oklahoma, as is provided in said Acts and as the same is construed by the Courts of last resort of the said State, provide that the said gross production tax on the said oil so produced is an ad valorem tax and therefore a tax upon the value of such land and the substances thereof.

VI

That therefore such tax so attempted to be assessed and levied upon the said oil so produced from the lands of the said plaintiff is contrary to and in violation of the said laws of the United States as contained in the said agreements and Acts of Congress mentioned above and the exemption from such taxation as contracted with the said plaintiff and guaranteed to said plaintiff under the said agreements and Acts of Congress mentioned above, the fulfillment of which said agreements was and is sanctioned by Congress and guaranteed to the said plaintiff.

VII

That heretofore and during the minority of the said plaintiff there was duly made and executed and delivered to the said defendant, The Pure Oil Company, a corpora- [fol. 10] tion, a certain — upon the said lands of the said plaintiff for the purpose of prospecting for and producing oil from the lands of the said plaintiff, and the defendant, The Pure Oil Company, is now producing oil from the said premises and has been producing oil therefrom as set forth above as the lessee of said plaintiff.

VIII

That under the said laws of the State of Oklahoma with reference to said gross production tax on oil as is provided in the said laws and as the same are construed by the courts of last resort of said State, the said tax upon the said production of the said oil is a property or ad valorem tax upon the mining business as a going concern and is a payment of all taxes "upon any property rights attached to or inherent in the rights to said minerals, upon leases for the mining of * * * petroleum, or other crude oil or other mineral oil * * * upon the mining rights and privileges for the minerals aforesaid belonging or appertaining to land, upon the machinery, appliances and equipment used in and around any well producing petroleum or other crude or mineral oil * * * and actually used in the operation of such well * * *; and also upon the oil * * * hereinbefore mentioned, during the tax year in which the same is produced, and upon any investments in any of the leases, rights, privileges, minerals or property hereinbefore * * * mentioned or described."

Your petitioner would further show that he has not now and has never had, any property, improvements, appliances or machinery of any kind whatsoever upon the said [fol. 11] premises in connection with the production of oil therefrom but that the said lessee solely and exclusively mines and produces the said oil therefrom and simply pays to the said plaintiff his said proportionate part of said oil without expense, cost or charge to the said plaintiff. That as is contemplated by the said laws of the State of Oklahoma with reference to said gross production tax and as

the same is construed by the Supreme Court of said State, the payment of said three per cent of said gross production of said oil as such tax is intended and contemplated as the payment of the property or ad valorem tax, not only upon the said oil produced from the said premises but upon all of the other said property and property rights metioned above, including the said machinery, appliances, etc. That therefore the said lessee in paying three per cent of its said seven-eighths (⅞) of the said gross production of said oil from the said premises is paying not only upon the said oil but also upon all of the other said property and property rights owned by the said lessee and set out above, whereas the said lessor, owner of the land, is paying three per cent of the gross part of the said oil received by him in payment of his said tax upon the said oil and nothing more. That as heretofore stated it is the contemplation of the said Act, and as the same is construed by the Supreme Court of the said State, that the said three per cent of the total gross amount of the oil produced from the said premises is intended as a payment of the tax not only upon said oil but upon the said mining industry as a plant or going concern and that therefore, inasmuch as the said plaintiff has no property upon the said premises except being the owner [fol. 12] of the land, having acquired the same as set forth above, and inasmuch as the said lessee does have other property and property rights and a plant or going concern with machinery and appliances for the production and handling of the said oil that to require this said plaintiff to contribute three per cent of the gross portion of his said oil toward the payment of the said tax is a taking by the State of the property of this plaintiff to pay the tax of the said lessee without compensation to the said plaintiff and is also a depriving of the said plaintiff of his said property without due process of law and is also a denial to the said plaintiff of the equal protection of the law and is also imposing upon the said plaintiff a tax and burden which is not uniform among the people of the State obtaining oil from beneath the surface of the earth and is also a discrimination in said taxation laws against this said plaintiff, all of which is contrary to and in violation of the Constitution and laws of the United States as well as the Constitution and

laws of the State of Oklahoma and is therefore void and unenforcible as against this said plaintiff.

IX

That the said gross production tax law of the State of Oklahoma in truth and in fact also exempts the said royalty interest of the said plaintiff from such gross production tax but the said State Auditor erroneously rules, finds and holds that the said royalty interest of the said plaintiff is not so exempted but that the same is subject to said tax and is attempting to enforce the collection thereof by his said orders and actions herein mentioned and set forth.

[fol. 13] The plaintiff would further show that he is the owner of valuable real estate and other property in Oklahoma County, Oklahoma and as is provided by the said law of the State of Oklahoma, mentioned above, the said tax is made a lien upon all the property of the said plaintiff and the same is therefore apparently a cloud upon the title to the said real estate and other property of the said plaintiff and there is no means or method of removing such cloud except by this action as the said lien is so attempted to be made a lien in favor of the State of Oklahoma and this said plaintiff could not maintain an action against the said State to remove such cloud. That such lien on said property is invalid and is not due process of law as against this plaintiff.

XI

That under the said laws of the State of Oklahoma, the State Auditor of the said State is charged with the duty of collecting the said gross production tax upon the said oil produced from the lands in the said State and is authorized by the said laws of said State that in case the owner of the said land fails to pay his proportionate part of the said gross production tax upon the oil so produced from said lands that then the State Auditor of the State of Oklahoma may order the lessee or producer of the said oil from the said lands to so pay such proportionate part of such gross production tax upon the said oil which the owner of the said land should pay; that the proportionate part of the oil to be delivered by the said lessee or producer of the said oil to the owner of the land is commonly known and

[fol. 14] spoken of as the royalty of the said owner of said land and is deliverable and payable to the said owner of the said land. That under and by virtue of the said oil and gas lease under which the said defendant, The Pure Oil Company, is producing oil from the lands of the said plaintiff, it is provided that the said The Pure Oil Company shall pay and deliver to the said plaintiff one-eighth part thereof as the royalty or proportionate part of the said plaintiff as the owner of such land, as the consideration to be paid by the said lessee, The Pure Oil Company, for the privilege of exploring for and producing said oil from said lands. It is further provided by the said laws of the State of Oklahoma that when the said lessee or producer of said oil is notified by the State Auditor to pay the said proportionate part of the said tax which should be paid by the said lessor or owner of said land, that then the said lessee or producer of said oil may withhold a sufficient quantity of that part of the oil due or which may become due to the owner of said land to pay the tax of the said lessor, owner of the said land.

XII

That the said State Auditor of the State of Oklahoma is wrongfully and unlawfully and in violation of the laws of the United States, claiming that the said proportionate part of the said oil due and deliverable to the said plaintiff is subject and chargeable with the said gross production tax as provided by the laws of the State of Oklahoma and the said tax not having been paid by the said plaintiff as the owner of said land, the said State Auditor of the State of Oklahoma has notified the said The Pure Oil Company as the lessee, producer of the said oil from the said lands of the said plaintiff, to withhold from the proportionate part [fol. 15] of the said oil due and which may become due and deliverable to the said plaintiff until such sufficient quantity of the oil of the said plaintiff has been withheld to pay the said gross production tax in the sum of about $1050.00. The said plaintiff alleges that the said action of the State Auditor in so attempting to order the withholding by The Pure Oil Company of any of the oil of the said plaintiff for the purpose of paying the said gross production tax or any other tax or for any other purpose, is without authority

of law and is contrary to and in violation of the laws of the United States and that therefore the said State Auditor and his successors in office should be permanently enjoined from thus unlawfully and wrongfully interfering with the rights of this said plaintiff and attempting to impose upon this said plaintiff said unjust unlawful and void tax and the said defendant, The Pure Oil Company, should be commanded to ignore the order of the said State Auditor, and relieved from any duty or supposed duty to comply with the same, as well as relieved from any liability for ignoring such order. That unless the said State Auditor and his successors in office are so permanently enjoined as aforesaid from attempting to collect any of the said tax upon the proportionate part of the said oil due and deliverable to this said plaintiff that the said State Auditor and his said successors in office will so continue without authority of law and in violation of the said laws of the United States to attempt to impose upon this said plaintiff and his said proportionate part of said oil the said unjust, unlawful and void tax, all of which is and will be in violation of the [fol. 16] rights, immunities, exemptions and privileges guaranteed this said plaintiff under and by virtue of the said agreements and Acts of Congress, and other laws of the United States as set forth herein.

XIII

Plaintiff further alleges that the said purported tax upon his proportionate part of the said oil is unjust, unlawful and void and that to attempt to enforce the same against this said plaintiff violates the rights of the said plaintiff and imposes unlawful and unjust burdens and charges upon this said plaintiff in freeing himself and his property from the said unjust and unlawful and void claims of such taxation and for that purpose it will be necessary for the said plaintiff to employ attorneys and bear other unjust and unlawful burdens, costs and charges and the plaintiff will therefore suffer continuing irreparable damage and injury and the said plaintiff is also without adequate remedy at law for like reasons.

Wherefore: premises considered, plaintiff prays that the said C. C. Childers as State Auditor of the State of Okla-

homa, and his deputies, employees and agents and also his successors in office and their deputies, employees and agents, be permanently and eternally enjoined and forbidden from collecting or attempting to collect any tax from the said plaintiff on the proportionate part of the said oil of the said plaintiff so produced from the lands of said plaintiff and that the said order so heretofore made by the said State Auditor to the said The Pure Oil Company to withhold any portion of the said oil of the said plaintiff be forever abrogated, nullified and set aside and that the [fol. 17] said The Pure Oil Company be ordered and directed by this Court to ignore the said order of the State Auditor heretofore made as well as any orders which may be hereafter made by said State Auditor to withhold any portion of the oil due and deliverable or which may become due and deliverable to the said plaintiff on account of any taxes or taxation whatsoever and that the said plaintiff have all such other, further, general, legal and equitable relief as may be proper in the premises; and that he be granted a temporary injunction pending final hearing herein.

(Signed) Rainey & Flynn, Calvin Jones, Attorneys for Plaintiff.

Duly sworn to by Jerry R. McCoy. Jurat omitted in printing.

[fols. 18-21] [File endorsement omitted.]

[fol. 22] In District Court of Oklahoma County

[Title omitted]

Motion to Dismiss for Want of Equity—Filed November 7, 1925

Comes now, C. C. Childers, State Auditor of the State of Oklahoma, defendant herein, and moves the Court to dismiss the above entitled cause for want of equity for the reason that the Bill of Complaint filed herein does not state

facts sufficient to entitle the plaintiff to the relief prayed for, or to any relief.

C. C. Childers, State Auditor, State of Oklahoma. George F. Short, Attorney General. (Signed) V. P. Crowe, Assistant Attorney General.

[fol. 23] [File endorsement omitted.]

[fol. 24] In District Court of Oklahoma County

[Title omitted]

Amended Motion to Dismiss—Filed December 14, 1925

Comes now George F. Short, the duly elected, qualified and acting Attorney General of the State of Oklahoma, appearing in behalf of and upon the request of C. C. Childers, State Auditor of the State of Oklahoma, defendant herein, and admitting, solely for the purposes of this motion, every allegation of ultimate fact contained in the petition of the plaintiff, respectfully shows to this Honorable Court as follows:

I

That the taxing laws of the State of Oklahoma, affixing a tax upon the gross value of oil produced from under lands within said state, being Section 9814, Compiled Oklahoma Statutes, 1921, as the said laws are construed by the court [fol. 25] of last resort of said state, create in said tax a commutation of the general ad valorem property tax upon certain species of personal property; but said taxing laws do not, in words or intendment, purport to include the general ad valorem tax, if any, upon the land from under which said oil is produced, or interest of the nature of real property in said lands.

That the said laws, in affixing the said gross production tax in the manner aforesaid, do not conflict; with the provisions of the Curtis Act of June 28, 1898, (30 Stat. at L. 495, ch. 517); with the provisions of the Atoka Agreement of April 23, 1897, adopted June 28, 1898 and ratified August 24, 1898 (30 Stat. at L. 495, ch. 517, sec. 29); with the pro-

visions of the Choctaw Chickasaw Supplemental Agreement of July 1, 1902, ratified September 25, 1902, (32 Stat. at L. 641, ch. 1363); with the provisions of Act of Congress of April 21, 1904 (33 Stat. at L. 189, ch. 1402); with the provisions of Act of Congress of March 3, 1905 (33 Stat. at L. 1048, ch. 1479); with the provisions of Act of Congress of April 26, 1906 (34 Stat. at L. 137, ch. 1876); with the provisions of Act of Congress of May 27, 1908 (35 Stat. at L. 312, ch. 199); or with the provisions of any other act of Congress of the United States enacted within the grant of power to said body by the Federal Constitution.

III

That the said laws, affixing said gross production tax in the manner aforesaid, do not purport to affix a tax upon any business or occupation but solely upon lawfully taxable personal property, appraised upon the basis of its value for the use to which it is put.

[fol. 26]

IV

That neither the said laws, affixing said gross production tax in the manner aforesaid, nor the provisions of Chapter 20, Session Laws of Oklahoma, 1925, purport to affix a tax upon any property which tax shall be ultimately chargeable to other than the owner of such property.

V

That said laws, affixing said gross production tax in the manner aforesaid, and Chapter 20, Session Laws of Oklahoma, 1925, do not purport to unlawfully take any property without compensation to the owner thereof, contrary to the provisions of Amendment V., to the Federal Constitution or Section 23 of Article II., or Section 24 of Article II., of the Constitution of Oklahoma.

VI

That said laws, affixing said gross production tax in the manner aforesaid, and Chapter 20, Session Laws of Oklahoma, 1925, do not purport to take the property of any

person without due process of law, contrary to the provisions of Amendment V., or Amendment XIV., to the Federal Constitution, or Section 7 of Article II., of the Constitution of Oklahoma.

VII

That said laws, affixing said gross production tax in the manner aforesaid, and Chapter 20, Session Laws of Oklahoma, 1925, do not purport to deny to any person within the jurisdiction of the State of Oklahoma the equal protection of the laws, contrary to the provisions of Amendment XIV., to the Federal Constitution.

[fol. 27]

VIII

That said laws, affixing said gross production tax in the manner aforesaid, and Chapter 20, Session Laws of Oklahoma, 1925, do not purport to create a system of taxation which grants any special privilege, right or immunity to any person or class of persons, contrary to the provisions of Amendment XIV., to the Federal Constitution, or Section 51 of Article V., of the Constitution of Oklahoma; nor do they purport to impose any tax which shall not be uniform upon the same class of subjects contrary to the provisions of Section 5 of Article X., of the Constitution of Oklahoma; nor to exempt any property from taxation contrary to the provisions of Section 50 of Article V., of said Constitution.

IX

That the said laws, affixing said gross production tax in the manner aforesaid, and Chapter 20, Session Laws of Oklahoma, 1925, do not create any situation contrary to the provisions of the Constitution of the State of Oklahoma, or the Constitution of the United States, or any Act of Congress lawfully enacted in conformity with any grant of power to Congress.

X

That the said laws, affixing said gross production tax in the manner aforesaid, do not purport to exempt the interest of the plaintiff, in the oil produced from under his

land, from taxation, nor does said Chapter 20, Session Laws of Oklahoma, 1925, purport so to do.

[fol. 28]

XI

That the action of the State Auditor in proceeding to the collection of the said gross production tax from oil in which plaintiff has an interest, as alleged in the petition is not in conflict with any provision of the Constitution of the United States or of the State of Oklahoma, or of any valid law or part of law enacted under either of said instruments.

XII

It is further shown that said laws, affixing the said gross production tax as aforesaid specifically include within their terms and authorize the collection of said gross production tax from the class of property owned by plaintiff, from the class of persons to which plaintiff belongs and in the manner alleged in the petition.

XIII

That the Constitution of the State of Oklahoma authorizes the classification of persons and property for the purposes of taxation and the method of levying taxes as provided in said laws affixing said gross production tax as aforesaid, and said power is expressly reserved to the State by the Federal Constitution.

XIV

That there exists no valid exemption, in the Federal Constitution, the State Constitution, the laws of the United States, the laws of the State of Oklahoma, the theory of our form of government, or any recognized natural right of plaintiff, excluding him or his personal property from the form of tax provided by said gross production tax laws.

XV

[fol. 29] That the State of Oklahoma has ample power to levy the tax provided for by said gross production tax laws upon persons of the class to which plaintiff belongs and

property of the class of that alleged by the petition to be the subject of the attempted imposition of taxation by the State Auditor.

XVI

It is further shown that plaintiff has a speedy, efficient, ample and complete remedy at law, in the following: (a) Under the provisions of said gross production tax laws; (b) Under the provisions of Chapter 20, section 3, Session Laws of Oklahoma, 1925; (c) Under the provisions of Section 9971, Compiled Oklahoma Statutes, 1921.

XVII

That the petition fails to show wherein plaintiff will suffer irreparable injury should the injunctive relief be not granted.

XVIII

That the petition fails to state facts sufficient to entitle plaintiff to the interposition of equity by the granting of the injunctive relief prayed for, or to any relief.

Wherefore, in view of each and every of the premises, it is respectfully prayed that the cause be dismissed at the plaintiff's cost, that the defendant, C. C. Childers, State Auditor of the State of Oklahoma, be permitted to go hence, [fols. 30-32] and that this court make such order respecting the tender of the defendant, The Pure Oil Company, as may conform to law.

George F. Short, Attorney General, (Signed) V. P. Crowe, Leon S. Hirsh, Assistant Attorneys General, for the State Auditor.

[File endorsement omitted.]

In District Court of Oklahoma County

[fol. 33] [Title omitted]

Judgment—Filed December 23, 1925

Now on this, the 15th day of December, 1925, this cause coming on for hearing before the Court upon the motion to dismiss and the amended motion to dismiss filed by the defendant, C. C. Childers, which said motion and the amend-

ment thereof are treated as general and special demurrers and the Court, after hearing the argument of Counsel and being well and sufficiently advised in the premises, finds that the said motion and the amendment thereof, which are so treated as demurrers as aforesaid, should be sustained.

It is therefore ordered, adjudged and decreed by the Court that the said motion to dismiss and the amendment thereof, which are so treated as general and special demurrers aforesaid to the petition of the plaintiff, be and the same are hereby sustained and that the said petition [fol. 34] of the plaintiff be dismissed and he take nothing by this action, and that said defendants recover their costs herein expended.

To all of which action the plaintiff in open court duly excepts and also in open court prays an appeal to the Supreme Court of the State of Oklahoma and gives notice for such appeal to the Supreme Court of the State of Oklahoma, which is duly and properly entered in the proper records of this court as provided by law and the said plaintiff also asks and is given sixty days additional time within which to prepare and serve the case-made, the defendants to have ten days thereafter within which to suggest amendments thereto and the same to be settled and signed by the court upon five days written notice by either party to the other; and,

Whereas the State Auditor of the State of Oklahoma has requested the defendant, The Pure Oil Company, to withhold the sum of $1,054.63, the amount of tax claimed by the said State Auditor against the said plaintiff, as due on the 31st day of July, 1925, the said defendant, The Pure Oil Company, is hereby ordered to pay the said sum into this court to await the further order of this court and the final disposition of this cause upon appeal, should the same be appealed.

(Signed) Lucius Babcock, District Judge.

O. K.:
(Signed) George F. Short, Atty. Genl., by V. P. Crowe, Asst.

O. K.:
(Signed) Rainey & Flynn.

[fols. 35-49] [File endorsement omitted.]

[fol. 50] IN SUPREME COURT OF OKLAHOMA

17434

J. R. McCOY

vs.

C. C. CHILDERS et al.

Opinion by Riley, J.

JUDGMENT—April 5, 1927

And now this cause comes on for final decision and determination by the court upon the record and briefs filed therein.

And the court having considered the same finds that the judgment of the trial court in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause be, and the same is hereby affirmed.

Journal 13, page 146.

[fol. 51] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 17434

JERRY R. McCOY, Plaintiff in Error,

vs.

C. C. CHILDERS, as State Auditor of the State of Oklahoma, and THE PURE OIL COMPANY, a Corporation Defendants in Error.

OPINION—Filed April 5, 1927

Syllabus

1. Section 9814, Compiled Oklahoma Statutes, 1921, relating to a lien for gross production tax upon a royalty interest provides that "the amount of tax on the royalty

interest shall be a lien on such interest," and such a provision for such a lien on such interest is construed strictissimi juris and excludes a lien for such interest upon any other property, notwithstanding Section 9817, Compiled Oklahoma Statutes, 1921, which provides generally for the levy and collection of said gross production tax from the property, assets and effects of such persons, firm, association or corporation, and constitutes the tax a lien upon such property, and provides for a suit thereon.

2. Section 9814, supra, permits an aggrieved taxpayer of a gross production tax to pay such tax under protest and giving of notice, and the institution of an action at law to recover the same, and such a remedy is adequate, speedy, complete and exclusive.

Error from the District Court of Oklahoma County, State of Oklahoma

Honorable Lucien Babcock, Judge

Action by J. R. McCoy against C. C. Childers as State Auditor of the State of Oklahoma, and the Pure Oil Company, a corporation, to enjoin C. C. Childers as State Auditor, his deputies, employees and successors in office, from collecting or attempting to collect from the plaintiff in error his proportionate share of the gross production tax on his royalty due him from oil produced from allotted lands, and [fol. 52] to enjoin the defendant Pure Oil Company from withholding the portion of said oil from him, and to cancel the order made by the said State Auditor ordering the defendant Pure Oil Company to withhold from plaintiff his proportionate share of the oil on account of gross production tax levied. Motion by C. C. Childers to dismiss for want of equity, sustained. From which judgment plaintiff appeals. A. S. J. Shaw substituted as defendant in error. Judgment affirmed.

Affirmed.

Rainey, Flynn & Green & Anderson, Calvin Jones, for plaintiff in error.

George F. Short, Attorney General, V. P. Crowe, Assistant Attorney General, for defendants in error.

[fol. 53] RILEY, J.:

The parties appear here in the order as they did in the court below with the exception that by order of this Court, A. S. J. Shaw, in his official capacity, is substituted for C. C. Childers, the latter's term of office having expired on the 10th day of January, 1927, and the former having been elected and qualified and having assumed the duties and office of State Auditor on said date.

McCoy as plaintiff below sought an injunction against the defendant C. C. Childers as State Auditor, his deputies, employees, and successors in office, to prevent the levying and collection, or the attempt to levy and collect, from plaintiff McCoy his proportionate share of gross production tax upon oil produced by the Pure Oil Company and derived by him by reason of his royalty on his homestead and surplus allotments. It was alleged that plaintiff had theretofore leased his homestead and surplus allotments to the Pure Oil Company for the purpose of prospecting for and producing oil from said lands. It was also alleged that plaintiff was a one-fourth blood Chickasaw Indian, and that his described lands are non-taxable allotments under Acts of Congress and agreements between the Choctaw and Chickasaw Nations and the United States Government, and wherein it was provided that such lands should remain non-taxable so long as title remained in plaintiff not to exceed twenty-one years from date of patent; that said lands were so patented and that title so remains and that the twenty-one years have not expired. It was alleged that plaintiff McCoy is the owner of valuable real estate and other property in Oklahoma County, and that under the laws of the State of Oklahoma, the gross production tax is a lien upon all of the property of plaintiff and that the same constitutes a cloud upon the title of plaintiff on his other property throughout the State, and that there is no means or method of removing said cloud except by this action, inasmuch as the lien provided is in favor of the State. The petition further alleges that the defendant, State Auditor, is authorized, under the law, as construed by him, upon failure of plaintiff to pay his proportionate [fol. 54] part of the gross production tax, to make an order on the lessee to withhold from plaintiff his one-eighth royalty interest which may become due and payable until sufficient quantity of oil of plaintiff has been withheld to pay

said share of such gross production tax; that in fact such an order has been made and that oil is being withheld by the defendant Pure Oil Company in violation of plaintiff's rights.

It was not alleged, and it was not contended that the lands of plaintiff are now restricted against alienation, nor that the lease under which the oil in question was produced is a departmental lease, in any respect.

The defendant Pure Oil Company answered, setting forth that they held moneys derived from the sale of plaintiff's royalty under its lease and tendered said moneys into court for the benefit of the proper party.

The defendant, C. C. Childers, State Auditor, through the Attorney General, moved to dismiss the petition of plaintiff for want of equity, and upon a hearing of the motion of defendant to dismiss, the court treated the same as general and special demurrer and sustained the same dismissing plaintiff's action. From which judgment the plaintiff appeals.

The plaintiff in error urges for reversal of the cause the following propositions:

"Proposition No. 1. The District Court of Oklahoma County as a court of equity has jurisdiction of the matters involved herein.

"Proposition No. 2. The Gross Production Tax of Oklahoma is not applicable to the royalty interest of this plaintiff as the said oil is produced from the allotted lands of this plaintiff as a Chickasaw Indian and upon which allotment the tax exemption period under which said lands were allotted has not expired.

"(a) This royalty of the plaintiff is not taxable as oil for the reason oil is a part of the realty and the realty is expressly exempt.

"(b) This royalty is not taxable if considered as ordinary rents or produce from the land for the reason that a tax on rents or produce of the land is a tax on the land, the source from which the rents are derived and said land is expressly exempt.

"(c) This tax interferes with congressional legislation and the fulfillment of the contract and treaty obligations of the national government and is also a tax on a federal agency."

[fol. 55] The defendants urge the following grounds for sustaining the judgment rendered:

"1. Plaintiff in error has an adequate remedy at law, and, is, therefore, not entitled to equitable relief and the motion to dismiss for want of equity was properly sustained.

"2. The oil, upon which the tax in question was levied, when detached from the soil in which it was embedded becomes and is personal property and is subject to state taxation as any other personal property.

"3. The property, upon which the tax in question was levied, is not exempted from state taxation by the Constitution of Oklahoma or any of the laws of the State of Oklahoma.

"4. The property, upon which the tax in question was levied, is not exempted from state taxation by the Constitution of the United States or by any act of Congress or treaty with the Indians.

"5. The tax in question is not a tax upon a federal instrumentality, there being no Federal instrumentality involved in this case."

In determining the first proposition our attention is directed as to whether an adequate remedy at law is provided for plaintiff in error.

Section 9971, Compiled Oklahoma Statutes, 1921, provides as follows:

"In all cases where the illegality of the tax is alleged to arise by reason of some action from which the laws provide no appeal, the aggrieved person shall pay the full amount of the taxes at the time and in the manner provided by law, and shall give notice to the officer collecting the taxes showing the grounds of complaint and that suit will be brought against the officer for recovery of them. It shall be the duty of such collecting officer to hold such taxes separate and apart from all other taxes collected by him, for a period of thirty days, and if within such time summons shall be served upon such officer in a suit for recovery of such taxes, the officer shall further hold such taxes until the final determination of such suit. All such suits shall be brought in the court having jurisdiction thereof, and they shall have precedence therein; if, upon final determination of any such

suit, the court shall determine that the taxes were illegally collected, as not being due the state, county or subdivision of the county, the court shall render judgment showing the correct and legal amount of taxes due by such person, and shall issue such order in accordance with the court's findings, and if such order shows that the taxes so paid are in excess of the legal and correct amount due, the collecting officer shall pay to such person the excess and shall take his receipt therefor."

Thus by the general law it will be seen that it was the intention of the Legislature to provide an adequate remedy at law so that State Government might function without the burden of injunctive actions which might tend to prevent or restrain the collection of taxes to meet governmental needs.

[fol. 56] By special Act of the Legislature it is provided in Section 9973, Compiled Oklahoma Statues, 1921:

"Special Tax—Payment to State Auditor—Payments Under Protest.—None of the acts herein required to be done shall be enjoined by a court of equity, but any person aggrieved in any matter of collection, assessment or levy of any tax herein provided for shall pay the tax at the time and in the matter provided by law, except as stated in Section 2, Article 2-B, hereof, and at the time of payment shall file a written statement with the State Auditor, under oath, as provided in Section 10-11, Article 2-B, hereof, fully setting forth his complaint. The Auditor shall retain the payment as a special deposit to await the final decision on said complaint. And thereupon the same right of hearing and review shall be had upon said complaint as provided for herein in Section 10-11 of Article 2-B hereof."

Thus by special Act the remedy at law was provided for the recovery of a special tax, such as in the instant case, in the event it should be found the tax is in fact illegal. In addition, by the Act, the remedy by injunction previously available, was specifically taken away.

In Black, et al., v. Geissler, et al., 58 Okla. 335, 159 Pac. 1124, it was held that Section 4481, Revised Laws, 1910, authorizing injunction relief to restrain an illegal levy and the collection of a tax, was modified by Section 7, Chapter 107, p. 149, Session Laws, 1915, which latter Act provided an effectual remedy, and that the remedy so provided was plain, speedy, adequate and exclusive.

In the case of Tennesee V. Sneed, 96 U. S. 69, 24 L. Ed. 610, the Supreme Court of the United States had under consideration a statute similar to the one of Oklahoma and dealt with in the Black case, supra. The Supreme Court of the United States said:

"We think the regulation of the statute gave him an abundance of means of enforcing such right as he possessed. * * * A suit at law to recover money unlawfully exacted is a speedy, as easily tried and less complicated than a proceeding by mandamus. * * * No government could exist that permitted the collection of its revenues to be delayed by every litigious man or every embarrassed man, to whom delay was more important than the payment of costs."

Shelton v. Platt, 139 U. S. 591, 11 Sup. Ct. 646, 35 L. Ed. 273.

We, therefore, hold that this Court is committed to the doctrines that a statute which provided for the payment of taxes under protest and an action to recover same gives the taxpayer an adequate remedy at law and the same is exclusive.

[fol. 57] The plaintiff seeks to take himself from within the rule above stated by contending that the invalid lien imposed constitutes a cloud upon his property other than that from which the tax is drawn. He relies upon Shaffer v. Carter, 252 U. S. 36, 64 L. Ed. 445, the same being a case wherein a non-resident maintained an action to prevent the collection of a State income tax on the grounds that the income tax law imposed a lien upon the entire property of the taxpayer regardless of whether the income taxed was derived therefrom. It was there held:

"For removal of a cloud upon title caused by an invalid lien imposed for a tax valid in itself, there apears to be no legal remedy. Hence, on this ground at least, resort was properly had to equity for relief; and since the court of equity does not 'do justice by halves' and will prevent if possible, a multiplicity of suits, the jurisdiction extends to the disposition of all questions raised by the bill."

There the basis of equitable action was that the income tax itself was valid, but the law imposed a lien upon the entire property of the taxpayer irrespective of the fact

that a part of the property was not responsible for the production of the income taxed, therefore, the lien imposed on all the property was a cloud on that part of the property other than from which the income taxed was derived, hence invalid, and in the absence of an adequate relief at law, equity would afford a remedy.

If that rule is applicable here it is decisive of the contention. To determine the applicability of the rule we must inquire whether the lien imposed by the law providing for the gross production tax imposes a lien upon all of the property of plaintiff wherever situated and regardless of the fact that production of the oil is not derived from such property. The plaintiff's contention is based on Section 9817, Compiled Oklahoma Statutes, 1921, which provides in part:

" • • •such tax, interest and penalty shall constitute and remain a lien upon the property, assets and effects of such person, firm, association or corporation until paid, and may be recovered at the suit of the State in any court of competent jurisdiction of the County where any such property, assets and effects are located."

[fol. 58] We note that the word "all" is not used, and should the lien be made to apply to all of the property it would be by construction and intendment. Lien laws are strictly construed. We need not rely upon a strict construction for Section 9814, Compiled Oklahoma Statutes, 1921, of the same Act, provides in part:

"The tax hereby declared shall attach to and is levied on what is known as the royalty interest except such royalty interest of the State of Oklahoma, or such royalty interests as are exempt from taxation under the laws of the United States, and the amount of the tax on the royalty interest shall be a lien on such interest."

This provision negatives the contention of plaintiff that the tax in the instant case on plaintiff's royalty interest is a lien on his property in Oklahoma City and his other property throughout the State.

In the case of Muskogee Times-Democrat v. Board of County Commissioners of Muskogee County, 76 Okla. 188, this Court, in regard to statutory construction, said:

"Where there are two provisions of the statutes, one of which is special and particular and clearly includes the matter in controversy, and where the special statute covering the subject prescribes different rules and procedure from those in the general statute, it will be held that the special statutes applies to the subject-matter, and that the general statute does not apply."

We, therefore, hold that by Section 9814, supra, the lien for gross production tax on a royalty interest is a lien only on such interest, the tax and the lien imposed thereby in the instant case being only on the royalty interest and the attempt to enforce the same being only against the royalty interest the rule in the Shaffer case is not applicable.

It was intimated in the Shaffer case that the provisions of Section 9971, supra, relating to the method of paying of taxes under protest and bringing suit to recover the same applied only to ad valorem taxes, but in Johnson v. Boneparte, No. 17,159, — Okla. —, 249 Pac. 380, decided September 21, 1926, this Court held that said Section did not apply alone to ad valorem taxes, but likewise to any tax required to be collected by the County Treasurer and otherwise falling within the provisions of the Act, and the same [fol. 59] provisions were there held to extend to a special assessment made by a drainage district. The provisions are equally applicable to the payment of gross production tax. Nor must we extend such provision as to gross production by a strained construction, for by Section 9814, supra, it is provided:

" * * * that after such tax has been collected and distributed, or paid without protest, no complaint with reference to rate thereof shall be heard or considered."

Thus clearly it was intended said Section 9971, supra, should be applicable to gross production taxes. In addition Section 9973, supra, specifically provides for protest of a gross production tax paid to the State Auditor. We, therefore, hold that the remedy provided at law is adequate and exclusive.

The conclusion reached is decisive of the issue before us. The judgment of the trial court is affirmed.

Branson, C. J., Mason, V. C. J., Phelps, Lester, Clark, JJ., concur.

Harrison, Hunt, JJ., absent, not participating.

[fols. 60-68] Petition for hearing filed April 15, 1927, and amendment thereto, filed May 4, 1927 covering 6 pages omitted from this print. It was denied and nothing more by order May 10, 1927.

[fols. 69-71] Supersedeas Bond for $200.00, approved and filed July 2, 1927, omitted in printing.

[fols. 72 & 73] In Supreme Court of the United States

Stipulation of Portions of the Record to be Printed

The parties hereto hereby designate for printing under the supervision of the Clerk the following portions of the record to present the question involved, a complete transcript of which is being prepared for filing herein:

Petition of Plaintiff;
Motions to dismiss by State Auditor;
Judgment of the District Court of Oklahoma County thereon;
Opinion of the Supreme Court of the State of Oklahoma;
Refer to petition for rehearing and amendment thereto and the order denying the same, which order was made on May 10th, 1927;
Refer to bond;
Designation of portions of record to be printed.

It is hereby agreed by and between the parties hereto that the foregoing designation of portions of the record to be printed is adequate and sufficient for the presentation of the questions involved herein.

Robt. M. Rainy and Streeter B. Flynn, Attorneys for Petitioner.

Edwin Dabney, Atty. Gen'l, by J. Berry King, Asst., Alvin Richards, Attorneys for Respondents.

Endorsed on cover: File No. —. Oklahoma Supreme Court. Term No. —. Jerry R. McCoy, petitioner, vs. A. S. J. Shaw, as State Auditor of the State of Oklahoma, and The Pure Oil Company. Petition for writ of certiorari and exhibit thereto. Filed —— —, 1927. File No. —.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 31, 1927

The petition herein for a writ of certiorari to the Supreme Court of the State of Oklahoma is granted. And it is furthere ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILED
FEB. 25 1922
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921.

No. 405

JERRY B. McCOY, Petitioner,

v.

A. S. H. SHAW, as State Auditor of the State of Oklahoma, and THE PURE OIL COMPANY, a Corporation.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

ROBERT M. FAINLY,
STEPHEN B. PLATT,
Counsel for Petitioner.

MOORE & WEST,
FAINLY, PLATT, GREEN & ANDERSON,
CALVIN JONES,
Of Counsel.

(22,865)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 403

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JERRY R. McCOY, PETITIONER,

v.

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A. S. J. SHAW, AS STATE AUDITOR OF THE STATE OF OKLAHOMA, AND THE PURE OIL COMPANY, A CORPORATION, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

Your petitioner prays a writ of certiorari to be directed to the Supreme Court of the State of Oklahoma to reverse a decree rendered by it on the 10th day of May, 1927 (R., 25), which affirmed a judgment of the District Court of Oklahoma County, and respectfully shows:

1*d*

Statement of Case.

The petitioner, Jerry R. McCoy, is a Chickasaw Indian of one-fourth Indian blood and duly enrolled as a member of such Tribe in the State of Oklahoma. As such Chickasaw Indian there was patented to him the land described in the record, situated in Carter County, Oklahoma, a portion of which is what is known as homestead allotment and the other is his surplus allotment. His patent for his surplus was dated March 23, 1907, and his patent for his homestead was dated March 21, 1907. Several years before this action was commenced in the district court, and while McCoy was still a minor, the land was leased to Pure Oil Company in the usual form for oil and gas leases, providing that the owner, McCoy, should have a royalty of one-eighth of the oil produced, pursuant to which lease the lessee found oil upon the premises several years before the action was commenced and while the petitioner was still a minor, and oil is still so being produced from the premises.

By Section 29 of the Act of Congress of June 28, 1898, ratified August 24, 1898, commonly known as the Atoka Agreement, 30 Statutes, 495, it is provided:

> "All the lands allotted shall be nontaxable while the title remains in the original allottee but not to exceed twenty-one years from date of patent. * * *"

In 1916 the Legislature of Oklahoma passed an act known as the gross production statute (Compiled Okla-

homa Statutes 1921, Section 9814) providing, among other things, for the payment of a tax of three per centum of the gross value of the production of petroleum or other crude or mineral oil, the same to be paid quarter-annually for the periods ending March, June, September and December. The act provided also that the owner of the royalty should pay such tax upon his interest and excepted royalty interest of the State and such royalty interests as are excepted from taxation under the laws of the United States and provided that such tax upon the royalty interest should be a lien thereon. The act also provided that such payment is in lieu of and is a payment of all taxes upon any property rights attached to or inherent in the rights to said minerals, upon leases for the mining of petroleum or other crude or mineral oil and upon the mining rights and privileges for the minerals aforesaid belonging or appertaining to land and upon the machinery, appliances and equipment in and around any well producing petroleum or other crude or mineral oil and actually used in the operation of such well, and also upon the oil mentioned during the tax year in which the same is produced and upon any investments in any of the leases, rights, privileges, minerals or property mentioned.

In 1925 (S. L. 1925, page 20) the Legislature of Oklahoma passed an act purporting to authorize the State auditor to order the lessee or purchaser of the oil to withhold from the landowner a sufficient part of his royalty to pay the tax in case the landowner failed to

pay same. Section 2 of said act, which became effective April 2, 1925, is as follows:

> "The purchaser of all oil, gas or other minerals as hereinbefore referred to, shall recognize the State Auditor's order to withhold payment for all production wherein the gross prodiction tax and penalty are unpaid, until such tax and penalty are paid, and on failure of the producer or royalty owner to pay such tax and penalty, the purchaser of such production shall, on order of the State Auditor, pay such tax and penalty, and his receipt therefor shall be accepted by such producer or royalty owner in lieu of cash in settlement for such production."

McCoy became of age in the spring of 1925. Thereafter, there being some unpaid tax which the State Auditor alleged was due from McCoy on account of this royalty, the State Auditor issued an order to the Pure Oil Company to withhold from McCoy the sum of $1,054.63, which the auditor claimed was the tax then due with penalty and ordered the oil company to continue to withhold the tax for each quarter-annual period accruing in the future, all of which has been done by that company. On account of the slight degree of Indian blood of McCoy, all restrictions on the alien ability of his land were removed by Section 1 of the act of Congress of May 27, 1908. 35 Stat., 312. McCoy, still being the owner of his allotted land from which this oil was produced as stated, commenced his action in the District Court of Oklahoma County on October 20, 1925, to enjoin the State Auditor from his said acts; to cancel the said order made by the State

Auditor; to require the oil company to ignore the same, and to permanently enjoin and forbid the Auditor, his employees and successors, from attempting to collect any such tax. In addition to setting up the foregoing facts in his petition McCoy alleged that his said royalty was exempt from any such taxation on account of the fact that the lands from which the same was produced was so exempt from taxation; that to so attempt to tax his portion of said oil is contrary to and in violation of the laws of the United States as contained in the agreement between the United States and the Choctaw and Chickasaw Nations and in violation of the exemption from such taxation as was contracted with said McCoy and guaranteed to him under the said agreement and acts of Congress relating thereto. He also alleged the fact that the said gross production statute of Oklahoma as construed by the Supreme Court of the State (*in re* Skelton Lead & Zinc Co., 81 Okla., 134; 197 Pac., 495), was a tax upon the mining business as a going concern, and is a payment of a tax upon numerous rights, including the machinery, appliances and equipment used in and around a well producing petroleum; that only the lessee had any such machinery or equipment and that he, McCoy, had nothing except the land in connection with such production, and that, therefore, to require McCoy to pay 3 per cent of his part of the oil, which paid upon the oil alone, and to permit the lessee to pay 3 per cent upon his part of the oil, which was a payment of the tax upon all of these other rights, constituted a taking of his property to pay the tax of the lessee without

compensation to him, depriving him of his property without due process of law, and was a denial to him of the equal protection of law and imposed upon him a tax which was not uniform among the people obtaining oil from beneath the surface of the earth, and is a discrimination in said taxation laws against him. He further alleged that the said gross production tax law in fact exempted his royalty from such taxation, but that the State Auditor was erroneously holding and ruling that the same was not exempted, but was subject to said tax. He alleged that he is the owner of other valuable real estate in Oklahoma County, and that the said statute on its face attempts to make such tax a lien upon all the property of McCoy and was therefore apparently a cloud thereon and there was no means or method of removing such cloud except by his action; that such a lien was invalid and was not due process of law as against him. He also alleged that the action of the State Auditor, in issuing his said order, was in violation of the laws of the United States, and that he and his successors should be enjoined from unlawfully and wrongfully interfering with the rights of McCoy and attempting to impose this unlawful and void tax, and unless enjoined the State Auditor would continue in the future to order the withholding of the portion of McCoy's royalty to pay this tax, all of which would be without authority of law and in violation of the rights, immunities, exemptions and privileges guaranteed to McCoy under the said Atoka agreement and the acts of Congress relating thereto. He further alleged that the purported tax upon his royalty and

the attempt to enforce the same violates his rights and imposes unlawful and injurious burdens and charges upon him in freeing himself and his property from such injurious and unlawful taxes and will cause him to employ attorneys and bear other unjust burdens, costs and charges in that regard and that he will also suffer continued irreparable damage and injury and that he is without adequate remedy at law. He therefore prayed that the Auditor and his successors be permanently enjoined from collecting or attempting to collect such tax on this royalty, and that the order of the State Auditor to the oil company to withhold any portion of the same be annulled and set aside; that the oil company be directed to ignore said order as well as any further orders from the State Auditor, and that he have all such other general and equitable relief as may be proper.

The oil company filed an answer admitting that the Auditor had made such order upon it and that it was holding the moneys due McCoy on his royalty in order to apply same as a payment on the tax.

The auditor filed a motion to dismiss and an amended motion to dismiss, which however is but a general and special demurrer, as the motion to dismiss for the grounds set forth in such motion is unknown to the Oklahoma practice and is really a demurrer. The matter coming on for hearing before the trial court, the motions treated as demurrers were sustained and the plaintiff's petition ordered dismissed.

McCoy thereupon appealed to the Supreme Court of the State of Oklahoma which affirmed the trial court,

A. S. J. Shaw having succeeded Childers as Auditor and being duly substituted in the Supreme Court, 256 Pac., 25 (not yet officially reported); the syllabus of which decision is as follows:

> "1. Section 9814, Compiled Oklahoma Statutes, 1921, relating to a lien for gross production tax upon a royalty interest provides that 'the amount of tax on the royalty interest shall be a lien on such interest,' and such a provision for such a lien on such interest is construed *strictissimi juris* and excludes a lien for such interest upon any other property, notwithstanding Section 9817, Compiled Oklahoma Statutes, 1921, which provides generally for the levy and collection of said gross production tax from the property, assets and effects of such persons, firm, association or corporation, and constitutes the tax a lien upon such property, and provides for a suit thereon.
>
> "2. Section 9814, *supra*, permits an aggrieved taxpayer of a gross production tax to pay such tax under protest and giving of notice, and the institution of an action at law to recover the same, and such a remedy is adequate, speedy, complete and exclusive" (R., 16-17).

Petition for rehearing was filed by McCoy, which was later amended and was denied by the Oklahoma Supreme Court on May 10, 1927 (R., 25), and he now applies to this Court for a writ of certiorari to review the action of the Supreme Court of Oklahoma.

Statement of the Merits.

Before discussing the error of the Supreme Court as to the point of procedure upon which it affirmed the trial court ordering the action dismissed, we believe we should set forth the law showing that this royalty is not taxable, as it will be unnecessary for this Court to examine the decision of the Oklahoma court for error upon the point on which it decided the case, if in fact this royalty is taxable. The contention of McCoy is that his royalty is not taxable, inasmuch as the same is his portion of his own oil taken by him from his allotted land, which is not taxable.

Pollock *v.* Farmers Loan & Trust Co., 157 U. S., 429; 39 L. Ed., 759.

Thomas *v.* Gay, 169 U. S., 264; 42 L. Ed., 740.

Gillespie *v.* State of Okla., 257 U. S., 501; 66 L. Ed., 338.

Jaybird Mining Co. *v.* Weir, 46 Sup. Ct. Rep., 582.

Colonial Trust Co. *v.* Lewellyn, 12 Fed. (2nd), 481.

The case of Gillespie *v.* Okla., *supra*, seems to settle this question; therein this very gross production tax of Oklahoma is discussed, as is also the income tax law, and this Court treats the decisions as equally applicable and as settling the principle, whether the subject under discussion is gross production tax or income tax, and announced in that case the rule applicable to both such classes of taxation in the following language:

> "In cases where the principal is absolutely immune from interference, an inquiry is allowed into the sources from which net income is derived, and if a part of it comes from such a source, the tax is *pro tanto* void. * * *"

See, also, Lake Superior Consol. Iron Mines *et al. v.* Lord *et al.*, 271 U. S., 577.

State *v.* Snyder (Wyo.), 212 Pac., 758.

State of Texas *v.* Hatcher (Tex.), 281 S. W., 192.

Opinions from Attorney General, Vol. 19, page 161.

We next contend that to attempt to tax McCoy's royalty is an interference with the purpose and policy of the Federal Government and in that respect an interference with and a violation of a Federal agency. When this treaty was made in 1898 it was then the policy and hope of the national Government to teach the Indian the individual uses and ownership of property and thus to prepare him to take his place alongside the other citizens of the United States, totally abandoning the old tribal government and the common ownership of land. This was to be a marked step in the change of mode of the Indian's life; one of the main, if not the main, purposes which Congress had in mind and at any rate its greatest hope was for the Idians to use their land to the fullest extent, thus enabling them to rely upon their own means and to support themselves individually, separately and apart from any community aid. There are still some In-

dians who are incompetent to take care of themselves, and the Government, in caring for such Indians' lands, deems it its duty to see that the ores are mined therefrom for the benefit of such Indians and that the lessee, which is the instrumentality or part of the instrumentality for that purpose, is but a part of the scheme of the Government in fulfilling that duty.

We quote from the case of Jaybird Mining Co. *v.* Weir, *supra*, as follows:

> "The lessee is an agent or instrumentality employed by the government for the development and use of restricted lands and to mine ores therefrom for the benefit of its Indian wards."

And, again,

> "In each of these cases the tax was condemned as an attempt to tax an instrumentality used by the government in fulfilling its duty to the Indian."

If the Government, while acting as guardian of the Indian, deemed it to be its duty "to develop and use the Indian's land and mine the ores therefrom for the benefit of the Indian," then surely the Government, when it turned the land over to the Indian, wished the Indian to do those things for himself. The allottee himself is the instrumentality of the Government for those purposes just as much so as was the lessee where the Government was acting as guardian and employed a lessee to obtain the ores or oil from the land.

So we say that the Government desired that McCoy should use this land, should mine the ores therefrom

including this oil, and that the attempt to tax him upon the same would interfere with the policy, purpose and scheme of the Government and in fact would destroy its whole purpose.

United States *v.* Rickert, 188 U. S., 432; 47 L. Ed., 532.

Any scheme, policy or method employed by the Government is such governmental agency as is laid down in McCurdy *v.* United States, 246 U. S., 263; 62 L. Ed., 706, as follows:

> "Congress apparently believed that, in order to prepare the Indian for complete independence, he must be educated in self-control, and that this could best be done by committing to him gradually the care of his property.
>
> * * * * * * *
>
> "The policy of education and development through the bank account had been tried and found promising.
>
> * * * * * * *
>
> "It is education through the responsibility for spending * * * which constitutes the instrumentality employed by the Government in fitting the individual Osage Indian to take his full part as a citizen of the United States."

This tax exemption of McCoy's, arising under said agreement, constituted a contract between the Chickasaw Tribe and the National Government.

Choate *v.* Trapp, 224 U. S., 665; 56 L. Ed., 941.

It is a vested property right and as such is immune from interference by State legislation.

Choate *v.* Trapp, 224 U. S., 665; 56 L. Ed., 941.
Ward *v.* Love County, 253 U. S., 17; 64 L. Ed., 751.
Berryman *v.* Board of Trustees of Whitman College, 222 U. S., 334.

If, after mature consideration of the question as to whether or not this royalty is taxable, there should still be a lingering doubt as to whether or not it is taxable, this very doubt itself resolves the question in favor of the Indian, as the agreements with the Indians are liberally construed in their favor, as was said in Choate *v.* Trapp, *supra*, as follows:

> "But if there is any conflict between the natural meaning and the technical construction—if there were room for doubt or if there were any question as to whether this was a personal privilege and repealable or an incident attached to the land itself for a limited period, that doubt under this rule must be resolved in favor of the patentee."

Surely the Government, when it was trying to encourage the Indian to use his land, did not wish that he should be hampered and discouraged by having a tax imposed upon him each time he broke the crust of the earth in the uses thereof or to obtain some deposit from beneath the surface thereof, or if he should make it up into brick or sell some of the gravel therefrom by the wagon load. The Indian certainly did not un-

derstand that he was to be so taxed. He used the broadest term possible by saying that his land should be non-taxable, which covered every character of tax, whether it should be denominated income tax, gross-production tax, license tax, occupation tax, or otherwise. The name of the tax is immaterial.

Choate *v.* Trapp, *supra.*

Choctaw, O. & G. R. Co. *v.* Harrison, 235 U. S., 292; 59 L. Ed., 237.

As to the Decision of the Supreme Court of Oklahoma.

It will be noted that the Supreme Court of Oklahoma decided this case on the ground that the statute of Oklahoma was exclusive which required the payment of a tax and suit to recover the same. That therefore McCoy could not maintain the present action. The Oklahoma court overlooked the fact that the real substance of the action is to restrain the State and its agencies from violating the vested property rights of the petitioner and to protect his exemption from taxation which arises from his contract with the Federal Government and the Federal enactments relating thereto, which is a vested right and cannot be interfered with by State legislation or State agencies.

Berryman *v.* Board of Trustees of Whitman College, *supra.*

Ward *v.* Love County, *supra.*

Choate *v.* Trapp, *supra.*

This State statute cannot be interposed to justify the officers of the State in attempting to violate the vested

rights of the petitioner as the same are protected by Article 6, Article 10, and the Fifth and Fourteenth Amendments to the Constitution of the United States, and this Court has jurisdiction where such State statutes are attempted by the Supreme Court of the State to be held paramount to the rights of this petitioner.

Bunch *v.* Cole, 263 U. S., 250.

Ward *v.* Love County, *supra.*

Really, the fact that a tax is involved in this action is but incidental. The main purpose and effect of the action is to preserve and protect the vested property right of the petitioner, his exemption from taxation being such right.

Berryman *v.* Board of Trustees of Whitman College, *supra.*

Therefore, the Oklahoma statute, upheld by the Oklahoma Supreme Court, requiring the payment of the tax and the suit to recover same has no application where the matter to be protected is a vested property right and the tax is but incidental and but the means or one of the means of violating such right.

This gross production tax is payable quarterly and, therefore, it would involve four times as much litigation every year as the ordinary tax which is payable annually. It is readily seen that if McCoy were required to follow the Oklahoma statute, he would not only be required to be burdened with the payments of these taxes, in order to maintain his action, but he would be involved in four times as many lawsuits,

paying out four times as much counsel fees and advancing four times as much costs as would ordinarily be the case. So, certainly equity to prevent such multiplicity of suits has jurisdiction, regardless of the Oklahoma statute.

Osborn *v.* Bank of U. S., 9 Wheaton, 738; 60 L. Ed., 204.

U. S. *v.* Rickert, 188 U. S., 432; 47 L. Ed., 532.

Such was the language of Judge Lurton, later Justice Lurton, in the case of Union Land & Planters Bank of Memphis *v.* Memphis, 111 Fed., 561 (a case arising in Tennessee), as follows:

> "If it appears that the tax constitutes a cloud upon the title of the complainant, or that he will be subjected to irremedial damages, or to a multiplicity of suits, if compelled to rely upon a legal remedy alone, equity will interfere on the ground of the inadequacy of the remedy at law."

In the case of Shelton *v.* Platt, 139 U. S., 591, this Court was considering a case which came up from Tennessee which has a statute after which the Oklahoma statute was patterned, and upon the authority of a decision from this Court (Tennessee *v.* Sneed, 96 U. S., 69), based on said statute, the Oklahoma decision relies. Yet this Court in the Shelton case, even though Tennessee had such a statute which was upheld, uses this language:

> "And while an unconstitutional tax may, in the language of the learned Judge holding the Circuit Court, confer no right, impose no duty

> and support no obligation, it will be perceived that in our view the trespass resulting from proceedings to collect such void tax cannot be restrained by injunction where irreparable injury, *or other ground for equitable interposition is not shown to exist.*"

The court found in that case, however, that irreparable injury was not shown and there was no claim that the injunction was necessary to prevent a multiplicity of suits. Therefore, the injunction was denied.

McCoy in his petition sets up the fact that he will be involved in numerous lawsuits and will, also, suffer irreparable injury. The only reason for saying that the Oklahoma statute, requiring the payment of the tax, is exclusive, is on the theory that the same affords an adequate remedy at law. Yet, as stated in the two cases last cited, a remedy at law is not adequate where a party, in order to rely upon such legal remedy, would be subjected to a multiplicity of suits. The Oklahoma court overlooked this condition of the law.

There is no provision of the Oklahoma law or legal remedy provided where the taxpayer claims his property is exempt and this constitutes an important exception to the doctrine of non-interference by injunction.

Colorado, F. & L. S. Co. *v.* Beerbohm, 96 Pac., 443.

Siegfried *v.* Raymond, 60 N. E., 868.

Bednar *v.* Carroll, 116 N. W., 315.

Lenawee County Savings Bank *v.* City of Adrian, 35 N. W., 304.

St. Mary's Gas Co. *v.* Elk County, 43 Atl., 321.
Crim *v.* Town of Phillippi, 18 S. E., 466.
Union Pac. R. Co. *v.* McShean, 22 Wall., 444; 22 L. Ed., 747.
High on Injunctions, Vol. I (4th Ed.), page 504.
Missouri River F. S. & G. R. Co. *v.* Morris, 13 Kansas, 302.
City of Staunton *v.* Mary Baldwin Seminary (Va.), 39 S. E., 596.

Wherefore, petitioner prays that a writ of certiorari may issue out of and under the seal of this Court, directed to the Supreme Court of Oklahoma, commanding that court to certify the case to this Court for review and determination, as provided in the Act of Congress known as the Judicial Code and amendments thereto, or that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem appropriate and in conformity with said acts and the amendments thereto, and your petitioner will ever pray.

ROBT. M. RAINEY,
STREETER B. FLYNN,
Counsel for Petitioner.

MOORE & WEST,
RAINEY, FLYNN, GREEN & ANDERSON,
CALVIN JONES,
Of Counsel.

STATE OF OKLAHOMA,
Oklahoma County, ss:

Calvin Jones, being duly sworn, says that he is one of the attorneys and of counsel for the petitioners above named, and as such had personal charge of the case in the foregoing petition mentioned, in the District Court of Oklahoma County, Oklahoma, and the Supreme Court of the State of Oklahoma; that he has read the said petition by him subscribed, and that the facts therein stated are true as he verily believes.

CALVIN JONES.

Subscribed and sworn to before me this 8th day of July, 1927.

[SEAL.] LOTTIE BLIZZARD,
Notary Public.

My commission expires July 12, 1927.

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NO. 403

In the Supreme Court of the United States

OCTOBER TERM, 1927.

JERRY R. McCOY,
Petitioner,
vs.
A. S. J. SHAW, as State Auditor of the State of Oklahoma, and THE PURE OIL COMPANY, a Corporation,
Respondents.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF OF PETITIONER

Opinion Below

256 Pac. 25 (Not yet officially reported).

Jurisdiction

This Court granted application for writ of certiorari on the 31st day of October, 1927.

Question Presented

PART I.

Jerry R. McCoy is a Chickasaw Indian of one-fourth Indian blood, and there were allotted and patented to him certain lands in Carter County, Oklahoma. The period of twenty-one years from the date of his patent will not expire until some time in March, 1928. He still

retains the title to the land. By the statutes and decisions hereinafter set forth, such land is non-taxable so long as the title remains in said allottee, not to exceed 21 years from the date of patent. His land is leased to The Pure Oil Company under the usual form of oil and gas lease, whereby McCoy was to have as royalty one-eighth of the oil produced and certain portions of the gas. In 1916 the State of Oklahoma enacted what is known as the gross production tax statute, which purports to levy a tax of three per cent upon the royalty of McCoy. The lessee is producing and has been producing oil and gas from the premises for a number of years. In 1925 the State of Oklahoma enacted a statute purporting to authorize the State Auditor to demand of the lessee or purchaser of the oil, payment of the tax on this royalty in case it is not paid by the land owner. Thereafter and about September, 1925, the State Auditor made such an order upon The Pure Oil Company, the lessee, which was also the purchaser of the oil produced from the premises, and demanded that said company withhold from McCoy $1,054.63 for taxes on the royalty then unpaid and to continue to withhold sums from McCoy for the accruing gross production tax. This has been done and is being done by The Pure Oil Company. McCoy commenced his action in the District Court of Oklahoma County to enjoin the State Auditor from his acts and to require The Pure Oil Company to ignore the

same. The Auditor demurred to the petition, which was sustained, and when appealed by McCoy to the State Supreme Court, that Court affirmed the decision, applying Sections 9971 and 9973, C. O. S. 1921, which statutes are to the general effect that a person cannot contest taxes in any method except by paying the same and filing suit within certain time to recover back the taxes, as provided by statute. We say that as to this petitioner such statute is not applicable for the reason that the real gravamen of the suit is to protect the vested property right of McCoy, said exemption from taxation being such vested property right, which arose from his contract with the Federal Government and the federal enactments relating thereto, and which was assented to by the State in its Constitution; contending further that the fact that a tax happened to be involved was incidental and but a means of impairing and destroying this vested property right. McCoy further contends that inasmuch as this gross production tax is payable quarterly that in order to avail himself of the remedy provided by statute he would be subjected to a multiplicity of suits, and that therefore the legal remedy is not adequate. He also contends that there is no provision of the Oklahoma law or remedy provided when the taxpayer claims his property is exempt, and that this constitutes an important exception to the doctrine of non-interference by injunction.

PART II.

As to the merits of the controversy, McCoy contends that inasmuch as his land is not taxable that therefore this royalty, which is his part of the oil derived therefrom, is likewise exempt from taxation on the theory that where the principal is immune from interference the produce and yields derived therefrom are likewise immune and exempt.

The State authorities contend that such royalty is subject to taxation under the State Production Tax Statute.

The Statutes

(See Appendix hereto.)

Statement

The petitioner, McCoy, is a Chickasaw Indian of one-fourth blood, duly enrolled as such. There was patented to him as such Indian the land described in the record, situated in Carter County, Oklahoma, a portion of which is known as homestead allotment and the other as surplus. His patent for the surplus was dated March 23, 1907, and patent for the homestead dated March 21, 1907. Before action was commenced by McCoy and while he was still a minor, the land was leased to The Pure Oil Company in the customary form for oil and gas leases, providing that McCoy should have a royalty of

one-eighth of the oil produced and oil was so produced under the lease while the petitioner was a minor and for some time before he commenced this action, and is still being so produced. McCoy became of age in the spring of 1925. Thereafter, there being some unpaid tax which the State Auditor alleged was due from McCoy on this royalty, the State Auditor issued an order to The Pure Oil Company, it being the purchaser of McCoy's royalty oil, as well as the lessee, to withhold from McCoy the sum of $1,054.63, which the Auditor claimed was the tax then due with penalty, under the Gross Production Tax Statute of Oklahoma, and ordered the oil company to continue to withhold the tax accruing for each quarter annual period in the future, all of which has been done and is being done by the company.

The restrictions on the alienability of this land were removed as to McCoy by Section 1 of the Act of Congress of May 27, 1908, 35 Stat. 312, as McCoy is of only one-fourth Indian blood. McCoy still being the owner of the land, contended his royalty was not taxable and commenced his action in the District Court of Oklahoma County on October 20, 1925, to enjoin the State Auditor from his acts; to cancel the said order by the State Auditor; to require the oil company to ignore the same, and to permanently enjoin and forbid the Auditor, his employes and successors, from attempting to collect any

such tax. Furthermore, he alleged that said royalty oil was exempt from such tax on account of the fact that the land from which it was produced was exempt; that to so attempt to tax his royalty was contrary to and in violation of the laws of the United States as contained in the agreement between the United States and the Choctaw and Chickasaw Nations, and in violation of the exemption from such taxation as was contracted with him and guaranteed to him under the agreement and acts of Congress relating thereto.

He further alleged that the gross production tax statute of Oklahoma, as construed by the Supreme Court of Oklahoma (*In re. Skelton Lead & Zinc Co.*, 81 Okla. 134, 197 Pac. 495), was a tax upon the mining business as a going concern, and is the payment of tax upon numerous rights, including the machinery, appliances and equipment used in and around a well producing petroleum; that only the lessee had such machinery or equipment, and that he, McCoy, had nothing but the land in connection with said production, and that to require McCoy to pay 3% of his part of the oil, which pays upon the oil alone, and to permit the lessee to pay 3% upon his part of the oil, which was a payment of tax upon all of his other rights, constituted a taking of his property to pay the tax of the lessee without compensation to him, depriving him of his property without due process of

law, and was a denial to him of the equal protection of the law, and imposed upon him a tax which was not uniform among the people obtaining oil from beneath the surface of the earth and is a discrimination in said tax law against him.

He further alleged that said gross production tax statute in fact exempted his royalty from such taxation, but that the State Auditor was erroneously holding and ruling that the same was not exempted, but subject to tax. He alleged that he was the owner of other valuable real estate in Oklahoma County, and that said statute on its face attempts to make such a lien upon all the property of McCoy, and was therefore apparently a cloud thereon and there was no means or method of removing such cloud, except by this action; that such a lien was invalid and was not due process of law as against him.

He further alleged that the action of the State Auditor in issuing said order was in violation of the laws of the United States, and that he and his successors should be enjoined from unlawfully and wrongfully interfering with the rights of McCoy and attempting to impose this unlawful and void tax and unless enjoined the State Auditor would continue in the future to order the withholding of the portion of McCoy's royalty to pay this tax, all of which would be without authority of law and

in violation of the rights, immunities, exemptions and privileges guaranteed to McCoy under the said Atoka agreement and the Acts of Congress relating thereto. He further alleged that the purported tax upon his royalty and the attempt to enforce the same, violates his rights and imposes unlawful and injurious burdens and charges upon him in freeing himself and his property from such injurious and unlawful taxes and cause him to employ attorneys, to bear other unjust burdens, costs and charges, and that in that regard he will also suffer continued irreparable damage and injury and that he is without adequate remedy at law.

He prayed that the Auditor and his successors be permanently enjoined from collecting or attempting to collect this tax on this royalty oil, and that the order of the State Auditor to the oil company to withhold any portion of the same be annulled and set aside, that the oil company be directed to ignore said order, as well as any future orders from the State Auditor, and that he have all such other general and equitable relief as may be proper (R. 1-9).

The oil company filed an answer, admitting the Auditor had made the order upon it, and that it was holding the moneys due McCoy on his royalty oil pursuant to the order (R. 19).

The Auditor, through the Attorney General, filed

motions to dismiss, which are but general and special demurrers, and were so treated by the trial court (R. 9-14). Said motions so treated as demurrers were sustained (R. 14-15).

McCoy appealed to the Supreme Court of Oklahoma, which affirmed the judgment of the trial court, the syllabus of the opinion being as follows:

> "1. Section 9814, Compiled Oklahoma Statutes, 1921, relating to a lien for gross production tax upon a royalty interest provides that 'the amount of tax on the royalty interest shall be a lien on such interest,' and such a provision for such a lien on such interest is construed *strictissimi juris* and excludes a lien for such interest upon any other property, notwithstanding Section 9818, Compiled Oklahoma Statutes, 1921, which provides generally for the levy and collection of said gross production tax from the property, assets and effects of such persons, firm, association or corporation, and constitutes the tax a lien upon such property, and provides for a suit thereon.
>
> "2. Section 9814, *supra,* permits an aggrieved taxpayer of a gross production tax to pay such tax under protest and giving of notice, and the institution of an action at law to recover the same, and such a remedy is adequate, speedy, complete and exclusive" (R. 16-17).

Summary of Argument

Part I.

The petitioner contends that the state statute applied by the Supreme Court of Oklahoma, which requires as the exclusive remedy the payment of the tax and suit

to recover, is not applicable in this case; that his claim is based upon an exemption from taxation and that such exemption is given to him by his contract with the Federal Government and the federal enactments relating thereto, which were specifically assented to by the State in its Constitution, and that such exemption constitutes a vested property right. His action is really to preserve from destruction this vested property right, and the fact that a tax happens to be the means used by the State in attempting to destroy this vested property right is but incidental, as he is entitled to have this vested right protected from any means of destruction by the State; further contending that if this state statute were applicable to him still it does not give him an adequate remedy for the reason that this tax is payable four times a year and he would be involved in a multiplicity of suits in an attempt to avail himself of such remedy; that a legal remedy so burdened is not adequate. He also contends that there is no state statute applicable to a situation where the taxpayer claims his property is exempt from taxation.

PART II.

The petitioner further contends that inasmuch as his land, from which this oil is being produced, is exempt from taxation until March, 1928, that therefore his royalty interest, which is simply his part of the oil produced

from this land, is likewise exempt; that his part of the oil, to-wit, 1/8 thereof, which is the royalty, remains his at all times, and that under the lease the lessee is given 7/8 of the oil found on account of the uncertainty as well as the large expense involved in exploring for and producing the same. That if this tax be considered as a tax upon the land *eo nominee,* that then such tax is clearly illegal; that if such tax be considered as a tax upon the produce or yields of the land, or upon the occupation and uses of the land in obtaining such oil, that then such tax is clearly illegal under the principle of *Pollock* v. *Farmers Loan & Trust Co.,* 157 U. S. 429, 39 L. Ed. 759, and the later cases to which we will refer. The petitioner further contends that he may be considered as an agency or instrumentality of the Government for using and developing his lands and obtaining therefrom the ores, as the whole policy of the Federal Government shows that it was the desire of the Government that the Indian so use his lands, and he is a part of the instrumentality employed by the Government in equipping the Indian and training him in the individual uses and ownership of property in order that the Indian might take his place alongside the other citizens.

ARGUMENT

Part I.

The state statute is inapplicable and the Supreme Court of Oklahoma erred in deciding the case thereon.

The Supreme Court of Oklahoma decided this case on the ground that the statute requiring the payment of the tax and suit to recover same back was exclusive and that therefore McCoy could not maintain the action. That Court overlooked the fact that the real substance of the action is to restrain the State and its agencies from violating the vested property rights of the petitioner and to protect his exemption from taxation, which arises from his contract with the Federal Government and the Federal enactments relating thereto, which is a vested right and cannot be interfered with by State legislation or State agencies, and which exemption was specifically assented to by the State in its Constitution.

—*Berryman* v. *Board of Trustees of Whitman College*, 222 U. S. 334.

Ward v. *Love County*, 253 U. S. 17.

Choate v. *Trapp*, 224 U. S. 665.

This state statute cannot be interposed to justify the officers of the State in attempting to violate the vested rights of the petitioner, as the same are protected by Article VI, Article X and the Fifth and Fourteenth

Amendments to the Constitution of the United States, and this Court will take jurisdiction and decide the real merits where the decision of the Supreme Court of the State avoids the merits of the controversy and decides against the petitioner by applying some inapplicable state statute or decides the case upon some other ground, wholly untenable.

—*Bunch* v. *Cole*, 263 U. S. 250.
Ward v. *Love County, supra.*

The fact that a tax is involved in this action is but incidental. The main purpose and effect of the action is to preserve and protect the vested property right of the petitioner, his exemption from taxation being such right.

—*Berryman* v. *Board of Trustees of Whitman College, supra.*

The Oklahoma statute upheld by the Oklahoma Supreme Court, requiring the payment of the tax and the suit to recover same, has no application where the matter to be protected is a vested property right, and the tax is but incidental, and but the means, or one of the means, of violating such right. This gross production tax is payable quarterly, and therefore it would involve four times as much litigation each year as the ordinary tax, which is payable annually. It is readily seen that if McCoy were required to follow the Oklahoma statute he would not only be required to be burdened with the

payments of these taxes in order to maintain his action, but he would be involved in four times as many law suits, paying out four times as much counsel fees and advancing four times as much costs as would ordinarily be the case. Certainly equity to prevent such multiplicity of suits has jurisdiction, regardless of the Oklahoma statute.

—*Osborne* v. *Bank of United States*, 9 Wheat. 738.

United States v. *Rickert*, 188 U. S. 432.

The State of Tennessee has a statute upon which Section 9971 of the Oklahoma statute is patterned. That statute was upheld by this Court in *Tennessee* v. *Sneed*, 96 U. S. 69. The Oklahoma decision appealed from here relies principally upon that decision of this Court, and the Oklahoma Court takes the view that such statute is exclusive in all events. Such though is not the view of this Court. This Court decided the Sneed case in November, 1877.

Later there was a case, which arose in Tennessee, decided by Judge Lurton, later Justice Lurton, in October, 1901, to-wit, *Union & Planters Bank of Memphis* v. *Memphis*, 111 Fed. 561. In laying down the grounds which would authorize equitable interposition, regardless of the Tennessee statute, the Court mentioned as such ground the subjection to a multiplicity of suits if compelled to rely upon a legal remedy alone, using this language:

> "If it appears that the tax constitutes a cloud upon the title of the complainant or that he will be subjected to irremedial damages or to a multiplicity of suits if compelled to rely upon a legal remedy alone, equity will interfere on the ground of the inadequacy of the remedy at law."

After the case of *Tennessee* v. *Sneed* was decided, another case came up from Tennessee, to-wit, *Shelton* v. *Platt*, 139 U. S. 591, which was decided in April, 1891, and in that case this Court clearly recognizes that even though Tennessee has such a statute, it does not prevent the maintaining of equitable suits such as injunctions, where there is ground for equitable interposition such as the prevention of multiplicity of suits or irreparable injury. Otherwise it would have been unnecessary for this Court to have used the following language in the last mentioned case:

> "And while an unconstitutional tax may, in the language of the learned Judge holding the Circuit Court, confer no right, impose no duty and support no obligation, it will be perceived that in our view the trespass resulting from proceedings to collect such void tax cannot be restrained by injunction where irreparable injury, *or other ground for equitable interposition is not shown to exist.*" (Italics ours.)

The injunction was denied in that case only because the bill did not show that the equitable action was necessary to prevent irreparable injury and there was no claim of a multiplicity of suits. See, also, *Johnson* v. *Wells Fargo Co.*, 239 U. S. 244.

McCoy in his petition set up the fact that he will be involved in numerous law suits and will also suffer irreparable injury. The only reason for saying that the Oklahoma statute requiring the payment of the tax is exclusive is on the theory that the same affords an adequate remedy at law, yet, as stated in the two last quoted cases, a remedy at law is not adequate where a party, in order to rely upon such legal remedy, would be subjected to a multiplicity of suits. The Oklahoma Court overlooked this pertinent point of law.

There is no provision of the Oklahoma law or any legal remedy provided where the taxpayer claims his property is exempt, and this constitutes an important exception to the doctrine of non-interference by ~~exemption~~.

—*Colorado F. & L. S. Co.* v. *Beerbohm*, 96 Pac. 443.

Siegfried v. *Raymond*, 60 N. E. 868.

Bednar v. *Carroll*, 116 N. W. 315.

Lenawee County Savings Bank v. *City of Adrian*, 33 N. W. 304.

St. Mary's Gas Co. v. *Elk County*, 43 Atl. 321.

Crim v. *Town of Phillipi*, 18 S. E. 466.

Union Pac. R. Co. v. *McShean*, 22 Wall. 444, 22 L. Ed. 747.

High on Injunctions, Vol. 1 (4th Ed.), page 504.

Missouri River F. S. & G. R. Co. v. *Morris*, 13 Kan. 302.

City of Staunton v. *Mary Baldwin Seminary* (Va.), 39 S. E. 596.

Lastly we believe it proper to say here that this tax is assessed quarter-annually for the periods ending with March, June, September and December of each year. The tax is payable within thirty days after such period. The Supreme Court of Oklahoma has recently held that in order for the taxpayer to avail himself of the statute permitting the payment of the tax and suit to recover same, he must not only pay the tax under protest, but must so pay the same within the time the same is made payable by law.

—*S. L. & S. F. Ry. Co.* v. *Hendrickson* (not yet officially reported), decided Oct. 25, 1927.

McCoy's exemption expires in March, 1928. The time fixed by law for the payment of the tax has already passed for practically all of the tax from which he is claiming exemption. It is readily seen that if he cannot succeed in the present equity action, he is without remedy and will be forced to submit to this illegal tax and cannot now pay same and sue to recover it back.

Part II.

A.

If this tax is considered as a tax on the land it is clearly illegal, as the land is exempt.

It has been settled by this Court that this land of McCoy's is exempt from taxation.

—*Choate* v. *Trapp*, 224 U. S. 665, 56 L. Ed. 941.

Such exemption is a vested property right and as such is immune from interference by State legislation.

—*Choate* v. *Trapp, supra.*

Ward v. *Love County,* 253 U. S. 17, 64 L. Ed. 751.

Berryman v. *Board of Trustees of Whitman College,* 222 U. S. 334.

This tax exemption arising under the Atoka agreement, as mentioned, likewise constitutes a contract between the Chickasaw Tribe of Indians and the National Government.

—*Choate* v. *Trapp, supra.*

Minnesota has a Gross Production Tax Statute which seems to be very similar to the Oklahoma statute. This Court in *Lake Superior Consol. Iron Mines et al.* v. *Lord et al.,* 271 U. S. 577, held that such a tax was really a tax upon the land. We quote from that decision as follows:

> "By their several bills in the United States District Court, appellants alleged the invalidity of Chapter 226, Laws of Minnesota, approved April 11, 1923, because of conflict with the Fourteenth Amendment and the State Constitution. They sought to prevent its enforcement. That court held the enactment valid and, by decrees entered January 15, 1925, dismissed the bills. These appeals followed.
>
> "The challenged act (fourteen sections) effective from its passage provides:
>
> "Sec. 1. There shall be levied and collected upon

all royalty received during the year ending December 31, 1923, and upon all royalty received during each calendar year thereafter, for permission to explore, mine, take out and remove ore from land in this state, a tax of six (6) per cent.

"Sec. 2. For all purposes of this Act the word 'royalty' shall be construed to mean the amount in money or value of property received by any person having any right, title or interest in or to any tract of land in this state for permission to explore, mine, take out and remove ore therefrom; and the word 'person' shall be construed to include individuals, co-partnerships, associations, companies and corporations.

"Succeeding sections relate to reports to the Tax Commission, method of assessment, penalties, date of payment, etc. Section 5 provides: 'A person subletting land for the use of which he received royalty shall be required to pay taxes only on the difference between the amount of royalty paid by him and the amount received.' And Section 8: 'The situs of royalty for all purposes of this act shall be in this State; and the tax herein provided for shall be a specific lien from the time the same is due and payable upon all and singular the right, title and interest of the person to whom such royalty is payable, in and to the land for permission to explore, mine, take out and remove ore on which the royalty is paid."

And then speaking with reference to said enactment the Court continued:

"Ultimate construction of Chapter 226 is for the state courts, but, in the absence of that, we think the enactment may be reasonably interpreted as laying a tax upon interest in mineral lands from which permission has been given to extract ores upon payment of royalty. The amount of the exaction is determined

by reference to the sum actually received for the use of such interests.

"As the tax is laid upon land, neither the owner's residence nor the place fixed for payment of the royalty is important."

See, also:

—*State* v. *Synder* (Tex.), 281 S. W. 758.

State of Texas v. *Hatcher* (Tex.), 281 S. W. 192.

Opinions of Attorney General, Vol. 19, p. 161.

Barnes v. *Keyes,* 37 Okla. 6, 127 Pac. 261.

In the Oklahoma case cited, the Court had under consideration oil, and speaking specifically as to such oil and that being the mineral referred to, said:

"In other words, it is held that the minerals are part of the land itself and that the life tenant has no right to take the minerals any more than he would have the right to sell or dispose of a part of the surface of the lands."

B.

If this tax is considered as a tax upon the yield or produce of the land, such tax is illegal.

In the case of *Pollock* v. *Farmers Loan & Trust Co., supra,* this Court laid down the broad principle that where the land itself was non-taxable the income and yields therefrom were likewise non-taxable. That case involved a national income tax law before the Sixteenth Amendment to the Constitution, and involved such taxes

attempted to be levied upon the rents or income of land. This Court held that could not be done as the same would in effect be a tax upon the land itself. In stating the broad principle of the question, this Court there said:

> "If the Constitution had provided that Congress should not levy any tax upon the rea. estate of any citizen of any State, could it be contended that Congress could put an annual tax for five or any other number of years, upon the rents or income of the real estate?"

The question was answered in the negative. By transposing the relative positions of the National Government and the State of Oklahoma in the question just answered by this Court, the question there seems entirely analogous to the case at bar. In the Pollock case the Constitution prohibited the National Government from imposing unapportioned tax on real estate. In the case at bar the State of Oklahoma in its Constitution has specially agreed that all existing rights should continue as if no change in government had taken place and that property exempt from taxation by virtue of treaties and federal laws should so remain during the force and effect of such treaties or federal laws.

—*Choate* v. *Trapp, supra.*

These federal laws provided that the land of McCoy should be exempt from taxation. No particular kind of taxation was specified, but the broadest term was used which could be imagined and which would certainly cover

all classes of taxation regardless of the name. The name of the tax is immaterial.

—*Choate* v. *Trapp, supra.*

Choctaw O. & G. R. Co. v. *Harrison,* 235 U. S. 219, 59 L. Ed. 237.

Thus in the Pollock case the National Government could not tax the income and yields of lands without apportionment on account of the prohibition of the Federal Constitution against taxing the land, and on the same principle the State of Oklahoma cannot tax the income and yields from McCoy's land because of the federal laws to which the State agreed, exempting the land itself from taxation.

See, also:

—*Northwestern Mutual L. Ins. Co.* v. *State of Wisconsin,* — U. S. — (decided Nov. 21, 1927).

Thomas v. *Gay,* 169 U. S. 264, 42 L. Ed. 740.

Gillespie v. *State of Oklahoma,* 275 U. S. 501, 66 L. Ed. 338.

Jaybird Mining Co. v. *Weir,* 46 Sup. Ct. Rep. 582.

The case of *Gillespie* v. *Oklahoma, supra,* seems to settle this question in favor of McCoy. Therein this gross production tax statute of Oklahoma is discussed as is also the income tax law, and this Court treats the decisions as equally applicable and as settling the prin-

ciple whether the subject under discussion is gross production tax or income tax, and announced in that case the rule applicable to both such classes of taxation in the following language:

> "In cases where the principal is absolutely immune from interference, an inquiry is allowed into the sources from which net income is derived, and if a part of it comes from such a source, the tax is *pro tanto* void. * * *"

At the time that opinion was written the case of *Choctaw O. & G. R. Co.* v. *Harrison, supra,* involving a prior gross production tax of Oklahoma, had been decided. In that case this Court held the tax amounted to an occupation tax.

Also *Indian Territory Illuminating Oil Co.* v. *Oklahoma,* 240 U. S. 522, had been decided, which involved the ordinary *ad valorem* tax of Oklahoma on restricted Indian's leases. Also at that time there had been decided the cases of *Howard* v. *Gypsy Oil Co.,* 247 U. S. 503, 63 L. Ed. 1239, and *Large Oil Co.* v. *Howard,* 248 U. S. 549, 63 L. Ed. 416, both of which involved the gross production act of Oklahoma of 1916 (the very act which we are now considering), as applied to these Indian matters, and in the Gillespie case this Court, after referring to the cases of *Choctaw O. & G. R. Co.* v. *Harrison* and *Ind. Territory Illumniating Oil Co.* v. *Oklahoma,* said that the principle of those two cases was applied to the gross

production tax statute of Oklahoma of 1916 when passing upon the two Howard cases, *supra*, using this language:

> "Subsequently the principle was applied *per curiam* to gross production taxes under a later statute of 1916 without reference to the fact that the taxes instead of being in addition to were in lieu of all taxes upon property rights. *Howard* v. *Gypsy Oil Co.*, 247 U. S. 503, 63 L. Ed. 1239; *Large Oil Co.* v. *Howard*, 248 U. S. 549, 63 L. Ed. 416."

In the Gillespie case this Court also said:

> "The decision in 240 U. S. 522 (*Ind. Ter. Ill. Oil Co.* v. *Oklahoma*) that such leases were not taxable went on general principles, not on the nature of the particular statute."

In *Brown* v. *Maryland*, 25 U. S. 12 Wheat 419, 444, it was held that a tax on the occupation of an importer was the same as a tax on imports, and therefore void.

In *Weston* v. *Charleston*, 27 U. S. 2 Pet 449, it was held that a tax on the income of the United States securities was a tax on the securities themselves and void.

In *Dobbins* v. *Erie, County Commissioner*, 41 U. S. 16 Pet. 435, it was held that the income from an official position could not be taxed if the office itself was exempt.

In *Almy* v. *California*, 65 U. S. 24 How. 169, it was held that a duty on a bill of lading was the same thing as a duty on the article which it represented.

In *Northern Central Ry. Co.* v. *Jackson*, 74 U. S. 7

Wall. 262, it was held that a tax upon the interest payable on bonds was a tax not upon the debtor but upon the security.

In *Cook* v. *Pennsylvania,* 97 U. S. 566, it was held that a tax upon the amount of sales of goods made by an auctioneer was a tax upon the goods sold.

In *Philadelphia S. & M. S. S. Co.* v. *Pennsylvania,* 122 U. S. 326, and *Leloup* v. *Mobile,* 127 U. S. 640, it was held that a tax on income received from interstate commerce was a tax on the commerce itself, and therefore void.

The whole gist of the thought here is contained in the following quotations from the case of *Pollock* v. *Farmers Loan & Trust Co.,* to-wit:

> "The general rule has always been, in the language of Coke, that, 'If a man seized of land in fee, by his deed granted to another the profits of those lands, to have and to hold to him and his heirs and made a delivery *secundum forman charta* the whole land itself doth pass. For what is the land but the profits thereof?'"

And again:

> "Mr. Justice Patterson observed in *Hylton* v. *U. S.,* 3 U. S. 3 Dall. 171, 'Land independently of its produce is of no value.'"

Before closing under this head we wish to refer to the case of *Forbes* v. *Gracey,* 94 U. S. 762, 24 L. Ed. 313, as the State seeks its strongest support from that case.

However, when the facts of that case are examined it is found that it is exactly opposite to the case at bar. There the Federal Government in Nevada and other Pacific States had permitted persons, firms and corporations to take the ores from the government land without any compensation therefor and without even paying for the land, and the Government by its statutes provided that at the moment such ores became detached from the soil they became personal property, the exclusive ownership of which was in the person extracting the same, and that by reason of said statutes of the United States relating thereto and the rule of the Government on the subject,

> "It is then free from any lien, claim or title of the United States."

The property having been so detached and being then the exclusive personal property of the taker, it was sought to be taxed. This Court properly held the same taxable. The distinction between that case and the case at bar is this: The Federal Government and its property is not taxable by the State, but there the Federal Government when the tax was sought to be asserted, had no lien, claim or title to the property, as it had relinquished all of the same to the taker. In the case at bar, McCoy and his allotted land is not taxable by the State, and McCoy still has his land and this oil which the State is attempting to tax is still McCoy's oil taken from under his allotted land. If the United States Government had

still retained the title to these ores in the Forbes-Gracey case and had not relinquished the same, and the State had then attempted to tax said ores, it is clear that the same would not have been taxable, and that the Forbes-Gracey case would have so held.

C.

McCoy is the instrumentality of the Government in using his land and mining ores therefrom, and on this principle his oil is not taxable.

Here we say that the attempt to tax McCoy's royalty is an interference with the purpose and policy of the Federal Government, and in that respect an interference with and a violation of a federal agency. When the treaty was made in 1898 it was then the hope and policy of the National Government to teach the Indian the individual uses and ownership of property, and thus to prepare him to take his place on an equal footing with the other citizens of the United States, totally abandoning the old tribal government and the common ownership of land. This was a marked change in the Indian's mode of life. The Government wished the Indian to use his land under the separate ownership to the fullest extent, thus enabling him to rely upon his own resources and to support himself individually. There are still many Indian tribes who are incompetent to take care of themselves, and the Government in caring for such Indians,

deems it to be its duty to see that the ores are mined from such Indian's land for the benefit of the Indian, and in such cases the lessee, which is the instrumentality for that purpose, is but a part of the scheme of the Government in fulfilling its duty. This Court says such in the case of *Jaybird Mining Co.* v. *Weir, supra,* as follows:

> "The lessee is an agent or instrumentality employed by the Government for the development and use of restricted lands and to mine ores therefrom for the benefit of its Indian wards."

And again:

> "In each of these cases the tax was condemned as an attempt to tax an instrumentality used by the Government in fulfilling its duty to the Indian."

If the Government while acting as guardian of the Indian deemed it to be its duty "to develop and use the Indian's land and mine the ores therefrom for the benefit of the Indian," then surely the Government when it turned the land over to the Indian wished the Indian to do those very things for himself. The allottee is the instrumentality of the Government for those purposes, just as much so as was the lessee where the Government was acting as guardian and employed a lessee to obtain the ores or oil from the land. So we say that the Government desired that McCoy should use this land, should mine the ores therefrom, including this oil, and that the

attempt to tax him upon the same would interfere with the policy, purpose and scheme of the Government and in fact would destroy its whole purpose.

—*United States* v. *Rickert*, 188 U. S. 432, 47 L. Ed. 532.

Any scheme, policy or method employed by the Government in carrying out its policy with the Indians is a governmental agency. Thus in *McCurdy* v. *United States*, 246 U. S. 263, 62 L. Ed. 706, this Court said:

> "It is education through the responsibility of spending * * * which constitutes the instrumentality employed by the Government in fitting the individual Osage Indian to take his full part as a citizen of the United States."

See, also:

—*United States* v. *Bean*, 253 Fed. 1.

Weston v. *Charleston, supra.*

Surely the Government when it was trying to encourage the Indian to use his land did not wish that he should be hampered and discouraged by having a tax imposed upon him each time he broke the crust of the earth in the uses thereof or to obtain some deposits from underneath the surface thereof, or if he should make it up into brick or sell some of the gravel therefrom by the wagonload. The Indian certainly did not understand that he was to be so taxed. He used the broadest term possible by saying that his land should be non-taxable,

which covered every character of tax, whether it should be denominated income tax, gross production tax, license tax, occupation tax or otherwise. The name of the tax is immaterial.

CONCLUSION

We say that this royalty of the petitioner should be held non-taxable. If this Court, after fully considering the matter, should entertain a doubt as to whether or not this royalty is taxable, that doubt should resolve the question in favor of the Indian, as was said in *Choate* v. *Trapp, supra*:

> "The construction instead of being strict is liberal. Doubtful expressions, instead of being resolved in favor of the United States are to be resolved in favor of a weak and defenseless people, who are wards of the Nation and dependent wholly upon its protection and good faith. This rule of construction has been recognized without exception for more than a hundred years and has been applied in tax cases. * * *
>
> "In view of the universality of this rule, Congress is conclusively presumed to have intended that the legislation under which these allotments were made to the Indians should be liberally construed in their favor in determining the rights granted to the Choctaws and Chickasaws. * * *
>
> "But if there is any conflict between the natural meaning and the technical construction—if there were room for doubt or if there were any question as to whether this was a personal privilege and repealable or an incident attached to the land itself for

a limited period, that doubt under this rule must be resolved in favor of the patentee."

Respectfully submitted,

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APPENDIX

FEDERAL STATUTES

A portion of Section 29 of the Act of Congress of June 28, 1898, ratified August 24, 1898, commonly known as the Atoka Agreement (30 Stat. 495), is as follows:

> "All the lands allotted shall be non-taxable while the title remains in the original allottee, but not to exceed twenty-one years from date of the patent."

On account of the slight degree of Indian blood of McCoy, by Section 1 of the Act of Congress of May 27, 1908, 35 Stat. 312, all restrictions on the alienability of his land were removed.

STATE STATUTES

Section 9971, C. O. S. 1921:

> "In all cases where the illegality of the tax is alleged to arise by reason of some action from which the laws provide no appeal, the aggrieved person shall pay the full amount of the taxes at the time and in the manner provided by law, and shall give notice to the officer collecting the taxes showing the grounds of complaint and that suit will be brought against the officer for recovery of them. It shall be the duty of such collecting officer to hold such taxes separate and apart from all other taxes collected by him, for a period of thirty days, and if within such time summons shall be served upon such officer in a suit for recovery of such taxes, the officer shall further hold such taxes until the final determination of such suit. All such suits shall be brought in the

court having jurisdiction thereof, and they shall have precedence therein; if, upon final retermination of any such suit, the court shall determine that the taxes were illegally collected, as not being due the state, county or subdivision of the county, the court shall render judgment showing the correct and legal amount of taxes due by such person, and shall issue such order in accordance with the court's findings, and if such order shows that the taxes so paid are in excess of the legal and correct amount due, the collecting officer shall pay to such person the excess and shall take his receipt therefor."

Section 9973, C. O. S. 1921:

"None of the acts herein required to be done shall be enjoined by a court of equity, but any person aggrieved in any matter of collection, assessment or levy of any tax herein provided for shall pay the tax at the time and in the manner provided by law, except as stated in Section 2, Article 2-B, hereof, and at the time of payment shall file a written statement with the State Auditor, under oath, as provided in Sections 10-11, Article 2-B, hereof, fully setting forth his complaint. The Auditor shall retain the payment as a special deposit to await the final decision on said complaint. And thereupon the same right of hearing and review shall be had upon said complaint as provided for herein in Sections 10-11 of Article 2-B hereof."

In 1916 the Legislature of Oklahoma passed its gross production tax statute (C. O. S. 1921, Sec. 9814), providing, among other things, for the payment of a tax of 3% of the gross value of production of petroleum or other crude or mineral oil, the same to be paid quarter annually for the periods ending with March, June, Sep-

tember and December of each year, and is payable in thirty days after each period. The act provides also that the owner of the royalty should pay such tax upon his royalty interest and excepted royalty interest of the state and such royalty interests as are exempted from taxation under the laws of the United States and provided that such tax upon the royalty interest should be a lien thereon.

The act also provided that such payment was in lieu of and is a payment of all taxes upon any property rights attached to or inherent in the rights to said minerals, upon leases for the mining of petroleum or other crude or mineral oil and upon the mining rights and privileges for the minerals aforesaid belonging or appertaining to land and upon the machinery, appliances and equipment in and around any well producing petroleum or other crude or mineral oil and actually used in the operation of such well and also upon the oil mentioned during the tax year in which the same is produced, and upon any investments in any of the leases, rights, privileges, minerals or property mentioned.

In 1925 (S. L. 1925, page 20) the Legislature of Oklahoma passed an act purporting to authorize the State Auditor to order the lessee or purchaser of the oil to withhold from the land owner a sufficient part of his royalty to pay the tax in case the land owner failed

to pay the same; Section 2 of said Act, which became effective April 2, 1925, is as follows:

> "The purchaser of all oil, gas or other minerals as hereinbefore referred to, shall recognize the State Auditor's order to withhold payment for all production wherein the gross production tax and penalty are unpaid until such tax and penalty are paid, and on failure of the producer or royalty owner to pay such tax and penalty the purchaser of such production shall, on order of the State Auditor, pay such tax and penalty and his receipt therefor shall be accepted by such producer or royalty owner in lieu of cash in settlement for such production."

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Supreme Court of the United States

No. 403.

JERRY R. McCOY, PETITIONER,

vs.

A. S. J. SHAW, AS STATE AUDITOR OF THE STATE OF OKLAHOMA, AND THE PURE OIL COMPANY, A CORPORATION, RESPONDENTS.

MOTION TO DISMISS PETITION FOR WRIT OF CERTIORARI.

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Counsellors for Respondent.

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Supreme Court of the United States

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A. S. J. SHAW, AS STATE AUDITOR OF THE STATE OF OKLAHOMA, AND THE PURE OIL COMPANY, A CORPORATION, RESPONDENTS.

MOTION TO DISMISS PETITION FOR WRIT OF CERTIORARI.

Comes now A. S. J. Shaw, State Auditor of the State of Oklahoma, respondent herein, and respectfully prays that this Honorable Court dismiss the application of petitioner herein for a writ of certiorari to be directed to the Supreme Court of the State of Oklahoma, and as grounds therefor shows:

I.

That there is no Federal question decided by the Supreme Court of the State of Oklahoma in the case.

II.

That the State Court decided the case against the petitioner on independent non-Federal grounds broad enough to sustain such judgment.

III.

That this Court will not review a decision of a State court where that court decides a case on independent non-Federal grounds broad enough to sustain such judgment.

Wherefore, respondent prays that the application of petitioner for writ of certiorari be dismissed and that the writ be denied, and for such other and further relief in the premises as this Honorable Court may deem appropriate.

A. S. J. Shaw,
Respondent.

Edwin Dabney,
Attorney General.

V. P. Crowe,
Ass't. Atty. General.

Counsellors for Respondent.

BRIEF AND ARGUMENT IN SUPPORT OF MOTION TO DISMISS.

STATEMENT OF CASE.

The petitioner Jerry R. McCoy, a Chickasaw Indian of one-fourth Indian blood, received land patented to him, situated in Carter County, Oklahoma. A lease was executed by him to the Pure Oil Company without the supervision of the Department of the Interior, the said land so leased not being restricted against alienation under Section 1, Act of Congress of May 27, 1908, 35 Statutes 312. Oil was produced from said land so leased and royalty was reserved to the said McCoy, upon which royalty the State of Oklahoma, by the respondent herein, sought to collect the tax imposed thereon by Section 9814, Compiled Oklahoma Statutes 1921. Petitioner sought to enjoin the State Auditor of the State of Oklahoma from collecting said tax and the Supreme Court of the State of Oklahoma in the decision here sought to be reviewed (R. 16-24) held that the remedy by injunction under the statutes of Oklahoma was not available to petitioner but that his remedy was an action at law to recover taxes paid under protest as provided for in Section 9971, Compiled Oklahoma Statutes 1921.

Petitioner herein seeks to have a writ of certiorari issued to review the decision of the State court denying him injunctive relief.

STATEMENT OF MERITS.

It is conceded by respondent that by Section 29, Act of Congress June 28, 1898, 30 Statutes 495, all the lands allotted to the petitioner were non-taxable by the State so long as title thereto remains in the original allottee but not to exceed twenty-one years from date of patent.

The State of Oklahoma is not here seeking to tax the land so allotted to the petitioner, the right to tax such land being denied by the case of *Choate* v. *Trapp*, 224 U. S. 665, 56 L. ed. 941. The State here seeks to tax the oil of the petitioner produced from his land which when severed from the soil in which it is embedded becomes and is personal property distinct and separate from the land and, therefore, not exempt from State taxation.

Forbes v. *Gracy*, 94 U. S. 762.
Kelly v. *Ohio Oil Company*, 57 Ohio St. 317, 49 N. E. 399, 39 L. R. A. 765.
Nonomaker v. *Amos*, 76 N. E. 949, 4 L. R. A. (N. S.) 980.
Kelly v. *Keys*, 62 Atl. 911.

The property of an Indian, unless exempt from taxation, is taxable in the same manner as property belonging to other citizens and the rule for him is the same as other citizens, that is, no exemption exists by implication but must be clearly manifest.

Goudy v. *Meath*, 203 U. S. 146, 51 L. ed. 130.

The case of *Gillespie* v. *State of Oklahoma*, 257 U. S.

501, 66 L. ed. 338, relied upon by petitioner, denied the power of the State of Oklahoma to collect an income tax on oil produced by a lessee of restricted Indian land under a departmental lease for the reason that such taxation is an unconstitutional interference with a Federal instrumentality. It cannot apply here for the reason that the petitioner's land is unrestricted land and is, therefore, not under the supervision of the Federal government.

The same distinction may be made as to all decisions dealing with the taxability of Indian land or the products thereof where such land is restricted against alienation and is, therefore, supervised by the government.

No Federal question was decided by the Supreme Court of Oklahoma.

The entire opinion of the Supreme Court of Oklahoma is found in the record, pages 16 to 24, inclusive. The opinion itself discloses that it holds only that petitioner under the laws of the State of Oklahoma cannot enjoin the collection of the tax in question but must pay the same under protest and sue to recover the same. The opinion in the case is addrsesed solely to the remedy available to petitioner and nowhere decides or determines any Federal question. In fact, petitioner admits that the Supreme Court of Oklahoma based its decision on independent non-Federal grounds (Petitioner's brief, page 14).

The independent non-Federal grounds upon which the State Court decided the case are broad enough to sustain the judgment.

The Supreme Court of Oklahoma held that the petitioner's sole and exclusive remedy was provided for by Section 9971, Compiled Oklahoma Statutes 1921, which is as follows:

> "In all cases where the illegality of the tax is alleged to arise by reason of some action from which the laws provide no appeal, the aggrieved person shall pay the full amount of the taxes at the time and in the manner provided by law, and shall give notice to the officer collecting the taxes showing the grounds of complaint and that suit will be brought against the officer for recovery of them. It shall be the duty of such collecting officer to hold such taxes separate and apart from all other taxes collected by him, for a period of thirty days, and if within such time summons shall be served upon such officer in a suit for recovery of such taxes, the officer shall further hold such taxes until the final determination of such suit. All such suits shall be brought in the court having jurisdiction thereof, and they shall have precedence therein; if, upon final determination of any such suit, the court shall determine that the taxes were illegally collected, as not being due the State, county or subdivision of the county, the court shall render judgment showing the correct and legal amount of taxes due such person, and shall issue such order in accordance with the court's findings, and if such order shows that the taxes so paid are in excess of the legal and correct amount due, the collecting officer shall pay to such person the excess and shall take his receipt therefor."

By Section 9973, Compiled Oklahoma Statutes 1921.

the remedy by injunction against an illegal tax is specifically taken away as follows:

> "SPECIAL TAX—PAYMENT TO STATE AUDITOR—PAYMENTS UNDER PROTEST. None of the acts herein required to be done, shall be enjoined by a court of equity, but any person aggrieved in any matter of collection, assessment of levy of any tax herein provided for shall pay the tax at the time and in the manner provided by law, except as stated in Section 2, Article 2-B, herein, and at the time of payment shall file a written statement with the State Auditor, under oath, as provided in Section 10-11, Article 2-B, hereof, fully setting forth his complaint. The Auditor shall retain the payment as a special deposit to await the final decision on said complaint. And thereupon the same right of hearing and review shall be had upon said complaint as provided for herein in Section 10-11 of Article 2-B hereof."

Where a remedy is provided for the payment of an alleged illegal tax under protest with suit to recover the same, such remedy is plain, speedy, adequate and exclusive.

> *Black et al.* v. *Geissler*, 58 Okla. 335, 159 Pac. 1124.
> *Going* v. *Carter Oil Company*, 214 Pac. 922.
> *Tennessee* v. *Sneed*, 96 U. S. 69, 24 L. ed. 610.
> *Shelton* v. *Platte*, 139 U. S. 591, 35 L. ed. 273.

This Court will not review a decision of State court based on independent non-Federal grounds and broad enough to sustain the judgment.

A review on writ of certiorari is not a matter of right but of sound discretion and will be granted only where there are important reasons therefor, and before the writ may

be granted to review the decision of a State court it must appear that a federal question was actually decided by that court.

Rules, Supreme Court of the United States, No. 35, subdivision 5.
Murdock v. *City of Memphis*, 20 Wall. 590, 87 U. S. 590.
Leathe v. *Thomas*, 207 U. S. 93, 52 L. ed. 118.
Eustis v. *Bolles*, 150 U. S. 361, 37 L. ed. 1111.
A., T. & S. F. v. *Sowers*, 213 U. S. 55, 53 L. ed. 695.
Fowler v. *Lamson*, 164 U. S. 252, 41 L. ed. 424.
Sauer v. *City of New York*, 206 U. S. 536, 546-7.
Ward v. *Love County*, 253 U. S. 17, 64 L. ed. 751.

The case of *Ward* v. *Love County*, *supra*, is much relied upon by petitioner. In that case the petitioner was an Indian who had sued to recover taxes alleged by him to be illegal. The Supreme Court of the State of Oklahoma had held that the taxes were voluntarily paid and hence could not be recovered. In reviewing the decision of the State court in that case, this Court found from the facts that the taxes were not in fact paid voluntarily but were paid involuntarily through the protest which the Indians were making in the State of Oklahoma in numerous suits denying the right of the State to tax their land.

The effect of that decision, therefore, is that the grounds upon which the State court decided the question were not sufficiently broad to sustain the judgment, and that the facts showed that the tax statute of Oklahoma re-

quiring taxes to be paid under protest and suit instituted to recover the same was in fact being followed by the petitioner. In the opinion the court said:

> "We accept so much of the Supreme Court's decision as held that if the payment was voluntary, the moneys could not be recovered back in the absence of a permissive statute, and that there was no statute. But we are unable to accept its decision in other respects."

Further in the decision, this court said:

> "It, therefore, is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect as by putting forward non-Federal grounds of decision that were without any fair or substantial support (citing cases). With this disqualification it is true that a judgment of a State court, which is put on independent non-Federal grounds broad enough to sustain it, cannot be reviewed by us."

The position of the petitioner in this case differs from his position in the Ward case in that here he ignores the statutory requirements of the State of Oklahoma for testing the legality of a tax and seeks to tie up the revenues of the State of Oklahoma by a writ of injunction. This Court, in the Ward case, did not decide that the remedy provided by paying taxes under protest and suing to recover them was inadequate but merely held from the facts in the case that the Indians there followed the tax statute of the State of Oklahoma by paying their taxes involuntarily.

The decision of the State court, which is here sought to be reviewed, is based solely upon the construction given to the statutes of the State of Oklahoma and relates only to the remedy which the petitioner has under the laws of the State of Oklahoma. Had petitioner invoked such remedy he might readily have had the merits of his case decided by the Supreme Court of the State of Oklahoma on the Federal questions raised in the record.

Since the independent non-Federal grounds upon which the decision of the State court is based are broad enough to support the judgment, we respectfully urge that petitioner's application for a writ of certiorari be dismissed and the writ denied.

Respectfully submitted,

EDWIN DABNEY,
Attorney General of Oklahoma.

V. P. CROWE,
Assistant Attorney General of said State.

Counsellors for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 403.—October Term, 1927.

Jerry R. McCoy, Petitioner, *vs.* A. S. J. Shaw, as State Auditor of the State of Oklahoma, and the Pure Oil Company.	On Writ of Certiorari to the Supreme Court of the State of Oklahoma.

[May 21, 1928.]

Mr. Justice Sanford delivered the opinion of the Court.

McCoy, the petitioner, a Chickasaw Indian of one-fourth blood, brought this suit in equity in a state court of Oklahoma to enjoin the collection of a gross production tax on his one-eighth royalty interest in the oil produced under a lease of lands patented to him as his homestead and surplus allotments from which all restrictions on alienation and incumbrance had been removed—claiming that this tax on his royalty share in the oil was in violation of the treaties between the United States and the Chickasaw Indians and the Acts of Congress relating thereto. The court dismissed the suit on motion, for want of equity; and this was affirmed by the Supreme Court of Oklahoma, without consideration of the federal question, on the ground that under §§ 9971 and 9973 of the Compiled Oklahoma Statutes, 1921, the petitioner had a plain, adequate and exclusive remedy at law by paying the tax under protest and suing for its recovery. 256 Pac. 25.

It is settled law that a judgment of a state court which is put upon a non-federal ground, independent of the federal question involved and broad enough to sustain the judgment, cannot be reviewed by this Court, unless the non-federal ground is so plainly unfounded that it may be regarded as essentially arbitrary or a mere device to prevent the review of a decision upon the federal question. *Leathe* v. *Thomas*, 207 U. S. 93, 99; *Vandalia Railroad* v. *South Bend*, 207 U. S. 359, 367; *Enterprise Irrig. Dist.* v. *Canal Co.*, 243 U. S. 157, 164; *Ward* v. *Love County*, 253 U. S. 17, 22; and cases therein cited.

Here the non-federal ground upon which the Oklahoma court based its decision—namely, that under the Oklahoma statutes the petitioner had a plain, adequate and exclusive remedy at law—was based on its earlier decision in *Black* v. *Geissler*, 58 Okla 335. It is in harmony with the decisions of this Court relating to similar statutes of other States. *Tennessee* v. *Sneed*, 96 U. S. 69, 75; *Shelton* v. *Platt*, 139 U. S. 591, 595; *Indiana Mfg. Co.* v. *Koehne*, 188 U. S. 681, 686; *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20, 39; *Singer Sewing Mach. Co.* v. *Benedict*, 229 U. S. 481, 487; *Union Pac. R. R. Co.* v. *Weld County*, 247 U. S. 282, 285. And no intent to evade the federal question is indicated.

We are without authority to determine the federal right claimed by the petitioner. And the writ of certiorari is

Dismissed for want of jurisdiction.

A true copy.

Test:

Clerk, Supreme Court, U. S.